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Oct. T. 1878.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 669.

THE UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DODGE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED APRIL 16, 1878.

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1 Pleas before the honorable John F. Dillon, judge of circuit court of the United States for the eighth circuit and district of Nebraska, and the honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in said circuit court, at the term of November, A. D. 1876.

Be it remembered that on the 20th August, 1875, the Union Pacific Railroad Company filed a petition in said circuit court, which said petition is in words and figures following, to wit:

2 In the circuit court of the United States for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY, plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Dodge, Neb., defendant.

The above named plaintiff, The Union Pacific Railroad Company, complains of the above named defendant, The Board of County Commissioners of the County of Dodge, and states as follows:

First cause of action.

1. That the plaintiff is a corporation, created by the laws of the United States, to wit, by an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1, 1862; and under and in conformity with the provisions of a joint resolution of the Congress of the United States, entitled "Joint resolution for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad Company, and for other purposes," approved April 10, 1869, the general office of the plaintiff was established, and has since remained, and now is in the city of Boston, in the State of Massachusetts, and the plaintiff is a citizen of the State of Massachusetts.

2. That the defendant is a municipal corporation, created by the laws of the State of Nebraska, and is a citizen of the State of Nebraska.

3. That for the purpose of aiding in the construction of the railroad and telegraph line which the plaintiff was by said act authorized to construct and maintain, and for other purposes in said act specified, there was granted to the plaintiff by the above recited act, and by an act amendatory thereof, approved July 2, 1864, a large quantity of the public lands of the United States, to be thereafter ascertained, selected, set off, and conveyed by patents to the plaintiff upon the terms and conditions, and within the limits in said above recited acts mentioned and expressed.

4. That pursuant to the provisions of said acts the plaintiff became entitled to have large quantities of said granted lands from time to time surveyed and set off, to be afterwards conveyed to it by patents, upon the conditions in said acts prescribed; and the same were so surveyed and set off from time to time; and among them were all the lands within the said county of Dodge which are hereinafter mentioned; but at the several times hereinafter mentioned the said lands had not, nor had any of them, been conveyed by patents, or otherwise, to the plaintiff, but the

title thereto in fee remained in the United States, and the plaintiff had not become entitled to have patents therefor issued to it, and its title thereto was only equitable and contingent; and, by reason of the premises, the said lands were not nor were any of them subject to or liable to be assessed for taxation by authority of the State of Nebraska, or of said county, or of any local division of either, but were by law wholly exempt from taxation.

5. That at the time prescribed by law for the listing and assessment of property in said county, in the year 1869, the plaintiff had such equitable and contingent title as aforesaid to a large quantity of lands, situate in the said county of Dodge, a particular description of which is omitted to avoid needless prolixity; and at or about that time the assessors of the respective precincts within which such lands or portions thereof were situated, listed and valued the same for taxation, and placed the same on their respective assessment rolls, at large valuations for the several parcels thereof, which assessment rolls they returned and delivered to the county clerk of said county.

3 6. That afterwards, in the year A. D. 1869, the county commissioners of said county met and levied the taxes for the then current year for the various purposes required, or by them pretended to be required, by law; but the plaintiff is unable to set forth at this time the special purposes for which or the precise rates at which they were levied.

7. That afterwards, in the said year, the county clerk of said county made out the tax list and duplicate for said county prescribed by law, in which were inserted descriptions of the plaintiff's said lands in said county, with the valuations affixed thereto, and the several species of taxes, and total taxes pretended to be levied upon the respective parcels of such lands, and in which the plaintiff was named and designated as the owner thereof; and the county commissioners of said county attached thereto their warrant, under their hands and official seals, requiring the treasurer of said county to collect the taxes therein levied according to law; and the said duplicate and warrant were delivered to the treasurer of said county for the purpose of the collection and enforcement of the taxes therein mentioned.

8. That afterwards, on or about the first day of October, A. D. 1870, the said treasurer, acting under and by virtue of said duplicate tax list and warrant, demanded of the plaintiff, and required it to pay to him the said several sums mentioned therein as the taxes on the said several parcels of land assessed to plaintiff, with interest thereon and certain fees, and threatened if the same should not forthwith be paid to levy upon, seize, take into his possession, and sell for the purpose of collecting the same, the personal property of the plaintiff, and especially the cars and locomotives of the plaintiff, with which it was then operating its railroad, before then built by it, and running through the State of Nebraska, under the acts aforesaid. And the plaintiff, upon its information and belief, alleges that the said treasurer would forthwith have so done if said taxes, interest, and fees had not been paid as demanded; whereby the plaintiff would have been subjected to and sustained irreparable damage by the stopping and detention of its trains and the interruption of its business, and would have been subjected to a multiplicity of actions for delays in the transportation of mails, military stores, passengers, and freight; and the public and the government would have been seriously prejudiced by such delays and interruptions.

9. That thereupon, to prevent the great damage and prejudice aforesaid, and also to remove from the title of said lands an apparent lien

and a cloud which would have prevented the plaintiff from selling or disposing of said lands as it desired, and was by the terms of said acts required to do, it did on the 6th day of October, A. D. 1870, pay to said treasurer, for said pretended taxes, with interest thereon and fees, the sum of $6,814.52. But at the same time it protested and insisted that the same could not lawfully be collected or demanded of the plaintiff, and served upon and delivered to the said treasurer a written notice and protest against such payment, therein declaring and insisting that said taxes were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and giving notice that the plaintiff would thereafter bring an action against said county to recover back the amount so paid with interest.

10. That thereupon, and about the time last aforesaid, the said treasurer paid over to and placed in the treasury of said county the whole or greater part of said money, which it used and expended; and thereby the said defendant became liable to pay to the plaintiff the said sum with interest thereon.

4 *Second cause of action.*

And for a second cause of action the plaintiff states as follows:

1. That, at the time prescribed by law for the listing and assessment of property in said county, in the year 1870, the plaintiff had such equitable and contingent title as aforesaid to a large quantity of lands, situate in the said county of Dodge, a particular description of which is omitted to avoid needless prolixity; and, at or about that time, the assessors of the respective precincts within which such lands or portions thereof were situated, listed and valued the same for taxation, and placed the same on their respective assessment-rolls, at large valuations for the several parcels thereof, which assessment-rolls they returned and delivered to the county clerk of said county.

2. That afterwards, in the year A. D. 1870, the county commissioners of said county met and levied the taxes for the then current year for the various purposes required, or by them pretended to be required, by law; but the plaintiff is unable to set forth at this time the special purposes for which, or the precise rates at which, they were levied.

3. That afterwards, in the said year, the county clerk of said county made out the tax-list and duplicate for said county prescribed by law, in which were inserted descriptions of the plaintiff's said lands in said county, with the valuations affixed thereto, and the several species of taxes, and total taxes pretended to be levied upon the respective parcels of such lands, and in which the plaintiff was named and designated as the owner thereof; and the county commissioners of said county attached thereto their warrant, under their hands and official seals, requiring the treasurer of said county to collect the taxes therein levied, according to law; and the said duplicate and warrant were delivered to the treasurer of said county for the purpose of the collection and enforcement of the taxes therein mentioned.

4. That afterwards, on or about the first day of August, A. D. 1871, the said treasurer, acting under and by virtue of said duplicate tax-list and warrant, demanded of the plaintiff and required it to pay him the said several sums mentioned therein as the taxes on the said several parcels of lands assessed to plaintiff, with interest thereon, and certain fees, and threatened, if the same should not forthwith be paid, to levy upon, seize, take into his possession and sell, for the purpose of collecting the same, the personal property of the plaintiff, and especially the cars and

locomotives of the plaintiff, with which it was then operating its railroad before then built by it, and running through the State of Nebraska, under the acts aforesaid. And the plaintiff, upon its information and belief, alleges that the said treasurer would forthwith have so done, if said taxes, interest, and fees had not been paid as demanded. Whereby the plaintiff would have been subjected to and sustained irreparable damage by the stopping and detention of its trains and the interruption of its business; and would have been subjected to a multiplicity of actions for delays in the transportation of mails, military stores, passengers, and freight; and the public and the government would have been seriously prejudiced by such delays and interruptions.

5. That thereupon, to prevent the great damage and prejudice aforesaid, and also to remove from the title of said lands an apparent lien and a cloud, which would have prevented the plaintiff from selling or disposing of said lands as it desired, and was by the terms of said acts required to do, it did, on the 24th day of August, A. D. 1871, on the 6th day of Oct., 1871, the 9th day of January, 1872, the 13th day of May, 1872, and the 28th day of June, 1872, pay to said treasurer, for said pretended taxes, with interest thereon and fees, the sums of $6,511.25, $22.45, $25.05, $15.90, and $64.35, respectively. But, at the same time, it protested and insisted that the same could not lawfully be collected or demanded of the plaintiff, and served upon and delivered to the said treasurer a written notice and protest against such payment, therein declaring and insisting that said taxes were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and giving notice that the plaintiff would thereafter bring an action against said county to recover back the amount so paid with interest.

6. That thereupon, and about the time last aforesaid, the said treasurer paid over to and placed in the treasury of said county the whole or greater part of said money, which it used and expended. And thereby the said defendant became liable to pay to the plaintiff the said sum, with interest thereon.

5 *Third cause of action.*

And for a third cause of action, the plaintiff states as follows:

1. That, at the time prescribed by the law for the listing and assessment of property in said county, in the year 1871, the plaintiff had such equitable and contingent title as aforesaid to a large quantity of lands, situate in the said county of Dodge, a particular description of which is omitted to avoid needless prolixity; and, at or about that time, the assessors of the respective precincts within which such lands or portions thereof were situated, listed and valued the same for taxation, and placed the same on their respective assessment rolls at large valuations for the several parcels thereof, which assessment rolls they returned and delivered to the county clerk of said county.

2. That afterwards, in the year A. D. 1871, the county commissioners of said county met and levied the taxes for the then current year for the various purposes required, or by them pretended to be required, by law; but the plaintiff is unable to set forth at this time the special purposes which, or the precise rates at which they were levied.

3. That afterwards, in the said year, the county clerk of said county made out the tax list and duplicate for said county prescribed by law, in which were inserted descriptions of the plaintiff's said lands in said county, with the valuations affixed thereto, and the several species of taxes, and total taxes pretended to be levied upon the respective parcels of such lands, and in which the plaintiff was named and designated as the owner thereof; and the county commissioners of said county attached

thereto their warrant, under their hands and official seals, requiring the treasurer of said county to collect the taxes therein levied, according to law; and the said duplicate and warrant were delivered to the treasurer of said county for the purpose of the collection and enforcement of the taxes therein mentioned.

4. That afterwards, on or about the first day of May, A. D. 1872, the said treasurer, acting under and by virtue of said duplicate tax-list and warrant, demanded of the plaintiff, and required it to pay to him the said several sums mentioned therein as the taxes on the said several parcels of lands assessed to plaintiff, with interest thereon and certain fees, and threatened if the same should not forthwith be paid to levy upon, seize, take into his possession and sell, for the purpose of collecting the same, the personal property of the plaintiff, and especially the cars and locomotives of the plaintiff, with which it was then operating its railroad before then built by it, and running through the State of Nebraska, under the acts aforesaid. And the plaintiff, upon its information and belief, alleges that the said treasurer would forthwith have so done, if said taxes, interest, and fees had not been paid as demanded. Whereby the plaintiff would have been subjected to and sustained irreparable damage by the stopping and detention of its trains and the interruption of its business; and would have been subjected to a multiplicity of actions for delays in the transportation of mails, military stores, passengers and freight; and the public and the government would have been seriously prejudiced by such delays and interruptions.

5. That thereupon, to prevent the great damage and prejudice aforesaid, and also to remove from the title of said lands an apparent lien and a cloud, which would have prevented the plaintiff from selling or disposing of said lands as it desired, and was by the terms of said acts required to do, it did on the 29th day of May, A. D. 1872, on the 3rd day of August, 1872, and on the 31st day of August, 1872, pay to said treasurer, for said pretended taxes, with interest thereon and fees, the sums of $2,931.26, $1,652.60, $1,24.26 respectively. But, at the same time, it protested and insisted that the same could not lawfully be collected or demanded of the plaintiff, and served upon and delivered to the said treasurer a written notice and protest against such payments, therein declaring and insisting that said taxes were illegally and wrongfully assessed and levied, and were wholly unauthorized by law, and giving notice that the plaintiff would thereafter bring an action against said county to recover back the amount so paid, with interest.

6. That thereupon, and about the time last aforesaid, the said treasurer paid over to and placed in the treasury of said county the whole or greater part of said money, which it used and expended. And thereby the said defendant became liable to pay to the plaintiff the said sum, with interest thereon.

6 Whereupon the plaintiff demands judgment against the defendant for the sum of $18,161.64, with interest on $6,814.52 thereof from the 6th day of October, A. D. 1870, and on $6,511.25 thereof from the 14th day of August, A. D. 1871, and on $22.45 thereof from the 6th day of October, A. D. 1871, and *and* on $25.05 thereof from the 9th day of January, 1872, and on $15.90 thereof from the 13th day of May, 1872, and on $64.35 thereof from the 28th day of June, 1872, and on $2,931.26 thereof from the 29th day of May, 1872, and on $1,652.66 thereof from the 3rd day of August, 1872, and on $124.26 thereof from the 31st day of August, 1872, and for costs.

A. J. POPPLETON,
E. WAKELEY,
Attorneys for Plaintiff.

STATE OF NEBRASKA,
Douglas County, ss:

A. J. Poppleton, being duly sworn, says he is an attorney for the plaintiff in the above-entitled action, and that he believes the facts stated in the foregoing petition to be true. The reason this verification is not made by the plaintiff is that it is a corporation.

A. J. POPPLETON.

Subscribed in my presence and sworn to before me this 20th day of August, A. D. 1875.

WATSON B. SMITH, *Clerk.*

7 Upon the back of said petition appear endorsements in words and figures following, to wit:

No. 213 C. United States circuit court, district of Nebraska. The Union Pacific Railroad Co. vs. Board Co. Com'rs Dodge County, Neb. Petition filed Aug. 20, 1875. Watson B. Smith, clerk. A. J. Poppleton and E. Wakeley, pl'ff's att'ys.

Thereupon afterwards, to wit, on said 20th day of August, 1875, a summons was issued in said case, which said summons is in words and figures following, to wit:

UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the marshal of the district of Nebraska, greeting:

You are hereby commanded to notify the defendant The Board of County Commissioners of Dodge County, Nebraska, that it has been sued by the Union Pacific Railroad Company in the circuit court of the United States for the district of Nebraska aforesaid at Omaha; that unless it answer by the 20th day of September, A. D. 1875, the petition of the said plaintiff against it, filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 30th day of August, A. D. 1875.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 20th day of August, A. D. 1875, and in the 100th year of the Independence of the United States of America.

Attest:
[SEAL.] WATSON B. SMITH, *Clerk.*

8 Attached to said summons is the return of the marshal in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 20th day of August, 1875, I received the within summons, and on the 26th day of August, 1875, I served the same upon the within-named the board of county commissioners of Dodge County, Nebraska, by John C. Seeley, cha'm'n of said board in Dodge county, State and district of Nebraska, by delivering to and leaving with him a certified copy thereof with all the endorsements thereon.

WM. DAILY,
United States Marshal for the District of Nebraska,
By H. S. MOODY,
Deputy United States Marshal.

Marshal's costs, $17.50.

Upon the back of said summons appear endorsements in words and figures following, to wit:

No. 213 C. United States circuit court, district of Nebraska. The Union Pacific Railroad Company vs. The Board of County Comm'rs Dodge Co., Neb. Summons. Amount claimed of the defendant by the plaintiff is $18,161.64 and interest and costs of suit. Filed Aug. 30, 1875. Watson B. Smith, clerk. A. J. Poppleton & E. Wakeley, pl'ff's att'ys.

Thereupon afterwards, to wit, on the 18th day of Sept., 1875, a demurrer was filed in said case, which said demurrer is in words and figures following, to wit:

9 *Demurrer.*

In the circuit court of the United States, for the district of Nebraska

THE UNION PACIFIC RAILROAD COMPANY, pl't'f,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Dodge, Nebraska, def't.

And now comes said defendant, by Hoxie & Munger, its atty's, and demures to the 1st cause of action in said plaintiff's petition stated, for the reasons following, to wit:

That said first cause of action does not state facts sufficient to constitute a cause of action against defendant.

And said defendant demures to the second cause of action in said plaintiff's petition states, for the reason, to wit:

That said second cause of action does not state facts sufficient to constitute a cause of action against defendant.

And said defendant demures to the second cause of action in plaintiff's petition states, for the reason that the same does not state facts sufficient to constitute a cause of action against defendant.

M. B. HOXIE &
W. H. MUNGER,
Att'ys for Defendant.

10 Upon the back of said demurrer appear endorsements in words and figures following, to wit:

No. 213 C. United States circuit court, district of Nebraska. The Union Pacific Railroad Co. vs. The Board of County Com's Dodge Co., Neb. Demurrer. Received and filed Sep. 18, 1875. Watson B. Smith, clerk. M. B. Hoxie & W. H. Munger, att'ys.

Thereupon, afterwards, at the November term of said court, on the 12th day of November, 1875, the following proceedings were had in said case, as appears of record on folio 386, Journal C of said court.

Demurrer overruled.

THE UNION PACIFIC R'D CO.
vs.
THE BOARD OF CO. COMM'RS OF DODGE CO. } 213 C.

This cause coming on to be heard this day, on the demurrer of said defendant to the petition of said plaintiff, was argued by counsel for the respective parties.

and were by the terms of said acts of Congress required to do; that plaintiffs paid the said several sums of money to the treasurer of said county in the years 1870, 1871, and 1872, stated in said petition, and denies that at the time said plaintiffs paid the said sums of money to said treasurer they protested and insisted that the same could not lawfully be collected or demanded, and served upon and delivered to said treasurer a written notice and protest against such payment, and that plaintiffs would thereafter bring an action against said county to recover back the amount so paid, with interest. But defendant alleges the fact to be that plaintiffs paid said several sums of money in said years of 1870, 1871, and 1872, voluntary, of their own free volition, and without any threat or menace on the part of said defendant or any of its servants or agents.

4th. And said defendant, for a fourth and further cause of defense, says that it denies that said treasurer paid over to and placed in the treasury of said county the whole or greater part of said money so paid in said years 1870, 1871, and 1872, which it used and expended, and that defendant became liable to pay to said plaintiff said sum and interest; but defendant alleges the fact to be that a large portion, to wit, about one-half of said sums of money so paid by said plaintiffs to said treasurer in the years 1870, 1871, and 1872, as stated in said petition, were assessed, collected, and received as agent of the State of Nebraska, and that about three-fourths of the remainder was assessed, collected,
16 and received as agent for school and road districts, and other public corporations within said Dodge County, as by law said commissioners and treasurer were required to do, and by said treasurer paid over to said State of Nebraska and said school and road districts and other public corporations in said Dodge County, and that only about one-eighth of the whole of said sums of money so collected by said treasurer from said plaintiff was paid over to said defendant and by it received to its own use.

Wherefore defendant prays judgment for its costs.

M. B. HOXIE,
W. H. MUNGER,
Attorneys for Defendant.

STATE OF NEBRASKA,
Dodge County, ss:

W'm H. Munger, being duly sworn, says that he is one of the attorneys for the defendant in the above-entitled action, and that he believes the facts stated in the foregoing answer to be true.

The reason this verification is not made by the defendant is that it is a corporation.

W. H. MUNGER.

Subscribed in my presence and sworn to before me this the tenth day of December, A. D. 1875.

[SEAL.] C. H. TONCRAY,
Notary Public.

17 Upon the back of said answer appear endorsements in words and figures following, to wit:

No. 213, C. United States circuit court, district of Nebraska. The Union Pacific Railroad Co. vs. Board Co. Commissioners Dodge Co., Nebraska. Answer. M. B. Hoxie and W. H. Munger, defendant's att'ys. Filed Dec. 10, 1875. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 22d day of April, 1875, a reply was filed in said case, which said reply is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY, plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Dodge, defendant.

The plaintiff, for reply to the answer in this action, states as follows:

1. It has no definite knowledge or information as to the alleged proceedings or sittings of the several boards of equalization in Dodge County in the several years mentioned in the answer. Wherefore it denies the allegations of the answer in that regard, and leaves the defendant to its proofs.

2. It denies that its action for the recovery of the monies paid
18 by it in the year 1871 was not commenced within four years next after its cause of action accrued.

3. It denies that patents for said lands were ready for delivery at any of the times in controversy in this action.

4. It denies that it paid any of said monies freely or voluntarily, or without threat or menace on the part of the defendant or its officer or agent.

5. It does not know nor is it well informed what precise portion of the taxes in controversy were levied for or paid over to the State of Nebraska or any school district or school districts. Wherefore it denies the allegations of the answer in that behalf and leaves the defendant to its proofs.

6. It denies each and every allegation of the answer not herein specially replied to which is inconsistent with or contradictory to the allegations of the petition.

A. J. POPPLETON,
E. WAKELEY,
Att'ys for Plaintiff.

STATE AND DISTRICT OF NEBRASKA,
Douglas County, ss:

E. Wakeley, being duly sworn, says he is one of the attorneys for the plaintiff in this action and believes the facts stated in the foregoing reply to be true.

The reason the verification is not made by the plaintiff is that it is a corporation.

E. WAKELEY.

Subscribed in my presence and sworn to before me this 22nd day of April, 1876.

WATSON B. SMITH,
Clerk.

19 Upon the back of said reply appear endorsements in words and figures following, to wit:

No. 213, C. In U. S. cir. court, dist. of Nebraska. The U. P. R. Co. vs. the Board of Co. Commissioners of the County of Dodge. Reply. A. J. Poppleton, E. Wakeley, att'ys for p't'ff. Filed Apr. 22, 1876. Watson B. Smith, clerk.

Thereupon, afterwards, at the May term of said court, on the 3d day of May, 1876, the following proceedings were had in said case, as appears of record on folio 521, Journal C, of said court.

UNION PACIFIC R'D CO.
vs.
BOARD COUNTY COM'RS of Dodge County. } 213, C.

It is ordered by the court, the parties herein consenting thereto, that this cause be, and the same is, referred to B. E. B. Kennedy, esq., as referee to take testimony on all the issues and points on which the parties herein cannot agree and stipulate; said referee to report the testimony and findings of fact to the court. Said findings of fact will be subject to exceptions by either party. All proofs taken herein are to be closed by October first, 1876.

Thereupon, afterwards, to wit, on the 18th day of November, 1876, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

2) THE UNION PACIFIC RAILROAD COMpany, pl'tf',
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Dodge, def't.

It is stipulated by the parties, by their attorneys, that in the event of this case being taken to the Supreme Court of the United States by plaintiff, and judgment being rendered for plaintiff upon the verdict being ordered by that court, there shall be deducted from the amount of taxes as agreed upon in the agreed statement of facts and found to have been paid, the amount taxes so paid upon lands fully earned and to which the land office and surveyor's fees had been paid and which the plaintiff was entitled to patents under the decision of the Secretary of the Interior.

W. H. MUNGER,
Attorney for Defendant.
A. J. POPPLETON,
E. WAKELEY,
Att'ys for Pl'ff.

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

No. 213, C. In U. S. cir. c't, dist. of Nebraska. The U. P. R. Co. vs. Board of Co. Com. of Dodge Co. Stipulation. Filed Nov. 18, 1876. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on said 18th day of November, 1876, an agreed statement of facts was filed in said case, which said agreed statement of facts is in words and figures following, to wit:

21 In the circuit court of the United States for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY, plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS of the County of Dodge, defendant.

The said parties hereby stipulate and agree upon the following facts in the above-entitled action:

1st. That in the year 1870 and 1871, at the time for the assessment of taxes in those years, the lands specified and described in schedules A and B, hereto annexed, were assessed by the respective assessors in said county as the property of the plaintiff.

2d. That said lands had been granted by act of Congress to the plaintiff to aid in the construction of its railroad and telegraph line; but no patents had been issued to the plaintiff for any of said lands, and no patents therefore were issued until after the payment of the taxes levied thereon as hereinafter specified.

3d. The said lands were returned by the United States land officers to the State auditor, and by said auditor to the county clerk, for taxation, as required by section 78, chapter 66, of the general statutes of Nebraska, 1873, and placed on the assessment list of said county for taxation, and the general and local taxes having been duly levied, were carried out against the same and therein charged to the plaintiff, which was designated as the owner of said lands; and there were attached to said tax lists in due form warrants of the county commissioners, under their hands and seal, requiring the treasurer to collect said taxes according to law, and the said lists and warrants were duly delivered to the treasurer of said county. That the board of county commissioners of said county met as a board of equalization at the time and in the manner prescribed by law, in each of said years. And the plaintiff did not appear before the said board, then and there to have the assessment rolls corrected or make any objections on account of said lands having been placed on the said rolls or not properly assessed.

4th. That on the 24th day of August, A. D. 1871, the plaintiff paid to the county treasurer of said county the taxes so assessed and levied on the said lands, referred to in schedule A, for the year 1870, and took the usual and proper receipts therefor, paying the following sums for the following purposes, to wit:

For county general fund	.....	$537 92
" " sinking do	.....	$323 07
" land road do	.....	$827 44
" county poor do	.....	$319 09
" court-house do	.....	$
" county bridge	.....	$375 73
" interest	.....	$ 90 00

The receipt for the taxes was dated August 11th, 1871, and interest computed to that date only, but were delivered to plaintiff on payment of the money August 24, 1871.

If any of said funds are held as a charge against defendant, then interest to be deducted in proportion, and defendant reserves the right to make proof showing the nature of said precinct tax.

22 On the 20th day of July, A. D. 1872, the plaintiff paid the treas-

Thereupon, afterwards, at the May term of said court, on the 3d day of May, 1876, the following proceedings were had in said case, as appears of record on folio 521, Journal C, of said court.

UNION PACIFIC R'D CO.
vs.
BOARD COUNTY COM'RS of Dodge County. } 213, C.

It is ordered by the court, the parties herein consenting thereto, that this cause be, and the same is, referred to B. E. B. Kennedy, esq., as referee to take testimony on all the issues and points on which the parties herein cannot agree and stipulate; said referee to report the testimony and findings of fact to the court. Said findings of fact will be subject to exceptions by either party. All proofs taken herein are to be closed by October first, 1876.

Thereupon, afterwards, to wit, on the 18th day of November, 1876, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMpany, pl'tf',
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Dodge, def't.

It is stipulated by the parties, by their attorneys, that in the event of this case being taken to the Supreme Court of the United States by plaintiff, and judgment being rendered for plaintiff upon the verdict being ordered by that court, there shall be deducted from the amount of taxes as agreed upon in the agreed statement of facts and found to have been paid, the amount taxes so paid upon lands fully earned and to which the land office and surveyor's fees had been paid and which the plaintiff was entitled to patents under the decision of the Secretary of the Interior.

W. H. MUNGER,
Attorney for Defendant.
A. J. POPPLETON,
E. WAKELEY,
Att'ys for Pl'ff.

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

No. 213, C. In U. S. cir. c't, dist. of Nebraska. The U. P. R. Co. vs. Board of Co. Com. of Dodge Co. Stipulation. Filed Nov. 18, 1876. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on said 18th day of November, 1876, an agreed statement of facts was filed in said case, which said agreed statement of facts is in words and figures following, to wit:

21 In the circuit court of the United States for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY, plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS of the County of Dodge, defendant.

The said parties hereby stipulate and agree upon the following facts in the above-entitled action:

1st. That in the year 1870 and 1871, at the time for the assessment of taxes in those years, the lands specified and described in schedules A and B, hereto annexed, were assessed by the respective assessors in said county as the property of the plaintiff.

2d. That said lands had been granted by act of Congress to the plaintiff to aid in the construction of its railroad and telegraph line; but no patents had been issued to the plaintiff for any of said lands, and no patents therefore were issued until after the payment of the taxes levied thereon as hereinafter specified.

3d. The said lands were returned by the United States land officers to the State auditor, and by said auditor to the county clerk, for taxation, as required by section 78, chapter 66, of the general statutes of Nebraska, 1873, and placed on the assessment list of said county for taxation, and the general and local taxes having been duly levied, were carried out against the same and therein charged to the plaintiff, which was designated as the owner of said lands; and there were attached to said tax lists in due form warrants of the county commissioners, under their hands and seal, requiring the treasurer to collect said taxes according to law, and the said lists and warrants were duly delivered to the treasurer of said county. That the board of county commissioners of said county met as a board of equalization at the time and in the manner prescribed by law, in each of said years. And the plaintiff did not appear before the said board, then and there to have the assessment rolls corrected or make any objections on account of said lands having been placed on the said rolls or not properly assessed.

4th. That on the 24th day of August, A. D. 1871, the plaintiff paid to the county treasurer of said county the taxes so assessed and levied on the said lands, referred to in schedule A, for the year 1870, and took the usual and proper receipts therefor, paying the following sums for the following purposes, to wit:

For county general fund	$537 92
" " sinking do	$323 07
" land road do	$827 44
" county poor do	$319 09
" court-house do	$
" county bridge	$375 73
" interest	$ 90 00

The receipt for the taxes was dated August 11th, 1871, and interest computed to that date only, but were delivered to plaintiff on payment of the money August 24, 1871.

If any of said funds are held as a charge against defendant, then interest to be deducted in proportion, and defendant reserves the right to make proof showing the nature of said precinct tax.

22 On the 20th day of July, A. D. 1872, the plaintiff paid the treas-

urer, in like manner, on the said lands referred to in Schedule B, the several sums and for the several purpose following for the taxes levied in 1871:

For county general fund		$309 96
" " sinking	do	$123 90
" land road	do	$418 32
" county poor	do	$92 40
" court-house	do	$
" bridge	do	$61 24
" interest		$

That no claim or demand is made for money paid by plaintiff at the same times as taxes into other funds than above specified.

5th. That at the same time, in each of said years, and as part of the same transaction, the plaintiff, by its agent, who made the said payment, served upon and delivered to the said treasurer a paper, of which the following is a copy, to wit, claimed by the plaintiff to be its protest:

To the Treasurer of Dodge County:

You are hereby notified that the Union Pacific Railroad Company protests against the payment of the State and county tax assessed and levied by your county upon its lands and property for the year 187 , and following, due May 1st, 187 , for the reason that the same is illegally and wrongfully assessed and levied, and is wholly unauthorized by law; and you are further notified that said company will hereafter bring an action against said county to recover back the amount of said tax and interest, the payment thereof being made under protest and objection above stated.

J. C. BLACKMAN,
Ag't. U. P. R. R.

6th. That no demand of said taxes, nor any effort to collect them, or threat to collect them, or any portion thereof, was ever made previous to the payment thereof, except such demand or threat, if any, as was implied by law.

7th. That at the time of all the proceedings for the assessment, levying, and collection of said taxes for the year 1870, the plaintiff owned lands in Dodge County, for which it had received patents, and which were liable to taxation, and had about miles of road-bed therein, which said real estate and road-bed were taxed and taxes paid on the real estate, including patented lands, in the same manner and at the same times as on the lands referred to in the schedules. And during both of said years it had personal property in said county which might have been seized for the payment and enforcement of said taxes; but it had no lands in the year 1870 on which it had received patents, its first patent being issued in February, 1871, but upon a portion of its lands taxed in 1870 it had paid the land-office and surveyor's fees, and earned such lands, and was entitled to a patent therefor.

8th. That before and after the payment of the surveying fees herein mentioned, and before and after the assessment of said lands for taxation, the plaintiff offered for sale and mortgaged all the lands granted to it and set apart for it, including those for which patents had
23 not been issued. But the lands described in the respective schedules were unsold at the date of the assessment and levy of the taxes for the respective years thereon.

9th. That previous to the time of assessing of said lands, there had been paid the land-office fees, and the cost of surveying of said lands,

and the plaintiff's railroad and telegraph line had been accepted by the Government of the United States, under the 4th section of the act of Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1st, 1862, so far that the subsidy bonds of the United States were issued therefor, and the lands were set apart or reserved. But patents therefore had not been issued and were withheld until after the payment of said taxes.

10th. That the patents were withheld as aforesaid by reason of the "joint resolution of the Congress of the United States for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad, and for other purposes," approved April 10, 1869, and of the report of Hiram Walteridge, F. M. Fenton, C. B. Comstock, E. F. Winslow and J. F. Boyd, commissioners, under said resolution, which report is set forth in Executive Document No. 90, of the second session of the 41st Congress, reported to the Senate of the United States, which may be offered at the trial.

And a letter of instructions transmitted by J. D. Cox, Secretary of the Interior, to Joseph L. Wilson, Commissioner of the General Land Office of the United States, dated November 3d, 1869, a copy of which is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, 3d Nov., 1869.

SIR: The commission to examine the Union Pacific and Central Pacific Railroads having reported, and its report having been accepted and made the basis of an adjustment of the accounts between the United States and said railroad companies, you are hereby authorized to commence the patenting of lands to such companies under grant made by Congress, as follows: In addition to the bonds retained by the United States as security for the completion of said roads in the matters reported deficient or not up to the standard by said commission, one-half of the lands ready for patenting to the Union Pacific Company will have patents suspended until further direction from this department. The other half may be patented to said company as fast as surveyed and other perliminaries are completed; that is to say: Beginning at Omaha and working westward, the odd number sections, 1, 5, 9, etc., will be patented first to the company (there being no valid adverse claim found), and section 3, 7, etc., withheld until further directions, as above stated. Patents to the Central Pacific may in like manner issue, beginning at Sacramento and working eastward.

It is my desire that the work be so systematized that it may be pushed forward as rapidly as possible.

Very respectfully, your obed't serv't,

J. D. COX,
Secretary.

Hon. JAS. S. WILSON,
Comm'r G. L. O.

24 And of a letter of the Secretary of the Interior, Columbus Delano, addressed to John Duff, vice-president and acting president of the Union Pacific Railroad Company, and dated the 9th day of February, A. D. 1874, a copy of which is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 9th February, 1874.

SIR: I have considered yours of the 3rd ult., in relation to the holding from your company of patents for half the lands granted them by the

acts of 1st July, 1862, and 2nd July, 1864. The order directing such withholding was issued by Mr. Secretary Cox, on the third (3) November, 1869. It was based on the report of the "five eminent citizens," authorized by the joint resolution of 10th April, 1869, and the patents were to be withheld as security for the completion of your company's road in the matters reported deficient or not up to the standard. During the four years that have elapsed since the issuing of said order repeated applications have, as you state, been made to me, for its rescinding or modification, applications which my sense of official duty has not permitted me to grant. Two examinations of the condition of the road have, of their own motion, been made by a portion of the government directors, who have submitted reports thereof to the department, but no examination has been made at the instance of the department to ascertain whether the defects reported by the "eminent citizens" have been supplied.

In the absence of legislation directing such re-examination it remains for the company to decide whether they will make application to the President for the appointment of commissioners for that purpose, and so I have been more than once informed the agents of the company who urged the repeal of Mr. Secretary Cox's order.

I can only repeat to you what has been said to them, that until this re-examination be made, the order will not be disturbed.

Very respectfully,

C. DELANO, *Secretary.*

JOHN DUFF, Esq.,
V. Prest. and Acting Pres't of the Co.,
office, Morton, Bliss & Co., New York City.

A. J. POPPLETON,
E. WAKELEY,
Attorneys for Plaintiff.
W. H. MUNGER,
Attorneys for Defendant.

25 Upon the back of said agreed statement of facts appear endorsements in words and figures following, to wit:

No. 213 C. In U. S. cir. c't, Dist. of Nebraska. U. P. R. Co. v's Board of Co. Commissioners of Dodge Co. Agreed facts. Filed Nov. 18, 1876. Watson B. Smith, clerk.

Thereupon afterwards, to wit, on said 18th day of Nov'r, 1876, a stipulation was filed in said case, which said stipulation is in words and figures following, to wit:

In the circuit court of the United States for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY, plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Dodge, defendant.

It is stipulated by the parties, by their respective attorneys, that the issues of fact in this action be tried and determined by the court, and that a jury is waived.

Dated Nov. 1876.

A. J. POPPLETON,
E. WAKELEY,
Attorneys for Plaintiff.

W. H. MUNGER,
Attorney for Defendant.

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

No. 213 C. In U. S. cir. c't, dist. of Nebraska. U. P. R. Co. v's Board of Co. Com. of Dodge Co. Stipulation waiving jury. Filed Nov. 18, 1876. Watson B. Smith, clerk.

26 Thereupon afterwards, at the November term of said court, on the 18th day of November, 1876, the following proceedings were had in said case, as appears of record on folio 708, journal C, of said court.

UNION PACIFIC RAILROAD CO.
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Dodge County. } 213 C.

This cause this day came on for hearing, and a jury being waived by stipulation of parties duly filed, the same was tried to the court, Mess'rs Poppleton and Wakeley appearing for the plaintiff and Mess'rs Hoxie and Munger appearing for the defendant.

Whereupon the court finds upon the issues herein in favor of the defendant, the board of county commissioners of Dodge County. It is thereupon ordered and adjudged that said defendant, the board of county commissioners of Dodge County, go hence without day and have and recover of and from said plaintiff, the Union Pacific Railroad Company, its costs, the same to be taxed by the clerk, and, the opinion of the judges differing on certain questions, a certificate thereof is filed and certified to the Supreme Court of the United States as provided by law in such cases.

Thereupon afterwards, to wit, on the 18th day of Nov'r, 1876, a finding of the court was filed in said case, which said finding is in words and figures following, to wit:

27 In the circuit court of the United States for the district of Nebraska.

THE UNION PACIFIC RAILROAD COMPANY, plaintiff,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Dodge, defendant.

At the November term, A. D. 1876, of the said court, this cause came on for trial, and the parties having filed a stipulation in writing waiving a jury, the issues of fact therein were tried by the court.

And the court finds the facts to be as follows, viz:

28 1st. That in the year 1870 and 1871, at the time for the assessment of taxes in those years, the lands specified and described in Schedules A and B, hereto annexed, were assessed by the respective assessors in said county as the property of the plaintiff.

2d. That said lands had been granted by act of Congress to the plaintiff to aid in the construction of its railroad and telegraph line—but no patents had been issued to the plaintiff for any of said lands, and no patents therefore were issued until after the payment of the taxes levied thereon as hereinafter specified.

3d. The said lands were returned by the United States land officers to the State auditor, and by said auditor to the county clerk, for taxation, as required by section 78, chapter 66, of the general statutse of Nebraska, 1873, and placed on the assessment list of said county for taxation, and the general and local taxes having been duly levied, were carried out against the same and therein charged to the plaintiff, which was designated as the owner of said lands; and there were attached to said tax lists in due form warrants of the county commissioners, under their hands and seal, requiring the treasurer to collect said taxes according to law, and the said lists and warrant were duly delivered to the treasurer of said county. That the board of county commissioners of said county met as a board of equalization at the time and in the manner prescribed by law, in each of said years. And the plaintiff did not appear before the said board then and there to have the assessment rolls corrected or make any objections on account of said lands having been placed on the said rolls or not properly assessed.

4th. That on the 24th day of August, A. D. 1871, the plaintiff paid to the county treasurer of said county the taxes so assessed and levied on the said lands, referred to in Schedule "A," for the year 1870, and took the usual and proper receipts therefor, paying the following sums for the following purposes, to wit;

For county general fund		$537.92
" " sinking	do.	$323.07
" land road	do.	$827.44
" county poor	do.	$319.09
" court house	do.	$.....
" county bridge	do.	$375.23
" interest	do.	$90.00

The receipt for the taxes was dated August 11th, 1871, and interest computed to that date only, but was delivered to plaintiff on payment of the money August 24th, 1871.

29 On the 20th day of July, A. D. 1872, the plaintiff paid the treasurer in like manner, on the said lands referred to in Schedule B, the several sums and for the several purposes following, for the taxes levied in :

For county general fund		$309 96
" " sinking	do	$123 90
" land road	do	$418 32
" county poor	do	$ 92 40
" court-house	do	$
" bridge	do	$ 61 24
" interest		$

That no claim or demand is made for money paid by plaintiff at the same times as taxes into other funds than above specified.

5th. That at the same time, in each of said years, and as part of the same transaction, the plaintiff, by its agent who made the said payment, served upon and delivered to the said treasurer a paper, of which the following is a copy, to wit, claimed by the plaintiff to be its protest (except as to date of taxes and when falling due, levied for the year 1871, in which were the dates 1871 and 1872 instead of 1870 and 1871):

To the treasurer of Dodge County:

You are hereby notified that the Union Pacific Railroad Company protests against the payment of the State and county tax assessed and levied by your county upon its lands and property for the year 1870, and

following due May 1st, 1871, for the reason that the same is illegally and wrongfully assessed and levied, and is wholly unauthorized by law; and you are further notified that said company will hereafter bring an action against said county to recover back the amount of said tax and interest, the payment thereof being made under protest and objection above stated.

J. C. BLACKMAN,
Ag't U. P. R. R.

6th. That no demand of said taxes, nor any effort to collect them, or any portion thereof, was ever made previous to the payment thereof, except such demand or threat, if any, as was implied by law.

7th. That at the time of all the proceedings for the assessment, levying, and collection of said taxes for the years 1871, the plaintiff owned lands in Dodge County, for which it had received patents, and which were liable to taxation, and had about miles of road-bed therein, which said real estate and road-bed were taxed and taxes paid on the real estate, including patented lands, in the same manner and at the same times as on the lands referred to in the schedules. And during both of said years it had personal property in said county which might have been seized for the payment and enforcement of said taxes. But it had no lands in the year 1870 on which it had received patents, its first patent being issued in February, 1871, but upon a portion of its lands taxed in 1870 it had paid the land office and surveyors' fees, and earned such lands and was entitled to patents therefor.

8th. That before and after the payment of the surveying fees herein mentioned, and before and after the assessment of said lands for taxation, the plaintiff offered for sale and mortgaged all the lands granted to it and set apart for it, including those for which patents had not been issued. But the lands described in the respective schedules were unsold at the date of the assessment and levy of the taxes for the respective years thereon.

9th. That previous to the time of assessing of said lands there had been paid the land office fees, and the cost of surveying of said lands, and the plantiff's railroad and telegraph line had been accepted by the Government of the United States, under the 4th section of the act of Congress of the United States, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1st, 1862, so far that the subsidy bonds of the United States were issued therefor, and the lands were set apart or reserved. But patents therefore had not been issued, and were withheld until after the payment of said taxes.

10th. That the patents were withheld as aforesaid by reason of the "joint resolution of the Congress of the United States for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad, and for other purposes," approved April 10, 1869, and of the report of Hiram Walteridge, F. M. Fenton, C. B. Comstock, E. F. Winslow, and J. F. Boyd, commissioners, under said resolution, which report is set forth in executive document No. 90, of the second session of the 41st Congress, reported to the Senate of the United States, which may be offered at the trial.

And a letter of instructions, transmitted by J. D. Cox, Secretary of the Interior, to Joseph L. Wilson, Commissioner of the General Land Office

of the United States, dated November 3d, 1869, a copy of which is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, 3d Nov., 1869.

SIR: The commission to examine the Union Pacific and Central Pacific Railroads, having reported and its report having been accepted and made the basis of an adjustment of the accounts between the United States and said railroad companies, you are hereby authorized to commence the patenting of lands to such companies under grants made by Congress, as follows: In addition to the bonds retained by the United States as security for the completion of said roads in the matters reported deficient or not up to the standard, by said commission, one-half of the lands ready for patenting to the Union Pacific Company will have patents suspended until further direction from this department. The other half may be patented to said company as fast as surveyed, and other preliminaries are completed; that is to say: Beginning at Omaha and working westward, the odd numbered sections, 1, 5, 9, etc., will be patented first to the company (there being no valid adverse claim found), and sections 3, 7, etc., withheld until further directions as above stated. Patents to the Central Pacific may in like manner issue, beginning at Sacramento and working eastward.

It is my desire that the work be so systematized that it may be pushed forward as rapidly as possible.

Very respectfully, your obed't serv't,

J. D. COX, *Secretary.*

HON. JAS. S. WILSON, *Comm'r G. L. O.*

31 And of a letter of the Secretary of the Interior, Columbus Delano, addressed to John Duff, vice-president and acting president of the Union Pacific Railroad Company, and dated the 9th day of February, A. D. 1874, a copy of which is as follows:

DEPARTMENT OF THE INTERIOR,
Washington, D. C., 9th February, 1874.

SIR: I have considered yours of the 3d ult., in relation to the holding from your company of patents for half the lands granted them by the acts of 1st July, 1862, and 2nd July, 1864. The order directing such withholding was issued by Mr. Secretary COX, on the third (3) November, 1869. It was based on the report of the "five eminent citizens" authorized by the joint resolution of 10th April, 1869, and the patents were to be withheld as security for the completion of your company's road in the matters reported deficient or not up to the standard. During the four years that have elapsed since the issuing of said order, repeated applications have, as you state, been made to me for its rescinding or modification, applications which my sense of official duty has not permitted me to grant. Two examinations of the condition of the road have, of their own motion, been made by a portion of the government directors, who have submitted reports thereof to the department, but no examination has been made at the instance of the department to ascertain whether the defects reported by the "eminent citizens" have been supplied.

In the absence of legislation directing such re-examination it remains for the company to decide whether they will make application to the President for the appointment of commissioners for that purpose, and so I have been more than once informed the agents of the company who urged the repeal of Mr. Secretary Cox's order.

I can only repeat to you what has been said to them, that until this re-examination be made the order will not be disturbed.

Very respectfully,

C. DELANO,
Secretary.

JOHN DUFF, ESQR.,
V. Pres't and Acting Pres't. of the Co.,
Office, Morton, Bliss & Co., New York City.

32 Upon the foregoing facts judgment was rendered for the defendants, but the undersigned judges hereby certify that they, in the consideration of the proper judgment to render on the said facts, they were opposed in opinion upon the following points, viz:

1st. Whether upon the said facts judgment ought to be rendered for the plaintiff or for the defendant.

2d. Whether the payment of said taxes was a voluntary payment in such sense as to preclude the right to recover them back.

3d. Whether the payment of the said taxes under the written protests above appearing, without any demand therefor or effort to collect the same, made the payment a compulsory one in such a sense as to give the plaintiff the right to recover back the amount thereof as at common law, there being no statute giving or regulating the right of recovery in such cases.

The judges being opposed in opinion as aforesaid, hereby certify such division of opinion at the request of counsel to the Supreme Court, pursuant to the statute in such case provided.

JOHN F. DILLON.
ELMER S. DUNDY.

Upon the back of said finding of the court appear endorsements in words and figures following, to wit:

No. 213 C. In U. S. cir. c't dis't of Nebraska. U. P. R. Co. vs. Board of Co. Com. of Dodge County. Finding and certificate of judges. Filed Nov. 18, 1876. Watson B. Smith, clerk.

33 Thereupon, afterwards, to wit, on the 29th day of January, A. D. 1878, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals:

34 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between the Union Pacific Railroad Company, plaintiff, and the Board of County Commissioners of the County of Dodge, Nebraska, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be

therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 29th day of January, 1878.

WATSON B. SMITH,
Clerk.

Allowed by—

ELMER S. DUNDY,
Judge.

(Indorsed:) No. 213 C. United States circuit court, district of Nebraska. The Union Pacific R. R. Co. vs. The Board of County Com'rs of Dodge Co., Neb. Writ of error. Filed Jany. 29, 1878. Watson B. Smith, clerk.

35 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To the Board of County Commissioners of Dodge County, Nebraska, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein the Union Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 29th day of January, 1878.

ELMER S. DUNDY,
Judge.

Service of the above accepted this 7th day of February, A. D. 1878.

W. H. MUNGER,
Att'y for Def'ts.

(Indorsed:) No. 213 C. United States circuit court, district of Nebraska. The Union Pacific Rd. Co. vs. The Board of Co. Commrs. of Dodge Co., Neb. Citation. Filed Feby. 7th, 1878. Watson B. Smith, clerk.

36 UNITED STATES OF AMERICA,
District of Nebraska, ss:

By virtue of the foregoing writ of error, and in obedience thereto, I, Watson B. Smith, clerk of the circuit court of the United States for the district of Nebraska, in the eighth circuit, do hereby certify that the foregoing folios, from one to 35, contain true and faithful transcripts of all pleadings, process, and proceedings of record and on file in my office as said clerk, in the case of the Union Pacific Railroad Company vs. The

Board of County Commissioners of the County of Dodge, Nebraska, and that a copy of the writ of error and citation has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Omaha, this 2d day of April, 1878.

[SEAL.] WATSON B. SMITH,
Clerk.

37 Whereupon, afterwards, to wit, on the 29th day of January, 1878, a supersedias bond was filed in said case, which supersedias bond is in words and figures following, to wit:

Know all men by these presents that we, the Union Pacific Railroad Company, as principal, and Jay Gould and Sidney Dillon, as sureties, are held and firmly bound unto the Board of County Commissioners of the County of Dodge, Nebraska, in the full and just sum of one thousand dollars, to be paid to the board of county commissioners of said county of Dodge, Nebraska, its certain attorney, successors, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally by these presents, sealed with our seals and dated this 18th day of January, A. D. 1878.

Whereas, lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between the Union Pacific Railroad Company, as plaintiff, and the said Board of County Commissioners of the County of Dodge, as defendant, judgment was rendered against the said Union Pacific Railroad Company, and the said Union Pacific Railroad Company having obtained a writ of error, and filed
38 a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Board of County Commissioners of the County of Dodge, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next:

Now the condition of the above obligation is such that if the said The Union Pacific Railroad Company shall prosecute the said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE UNION PACIFIC RAILROAD COMPANY,
[SEAL.] By SIDNEY DILLON,
President, as Principal.

HENRY MCFARLAND,
Secretary.

JAY GOULD, [SEAL.]
SIDNEY DILLON, [SEAL.]
Sureties.

29th January, 1878, the above bond is approved.
ELMER S. DUNDY,
Judge.

Upon the back of said supersedias bond appear endorsements in words and figures as follows, to wit:

No. 213 C. U. S. circuit court, district of Nebraska. The Union Pacific Railroad Company vs. The Board of County Commissioners of Dodge

County, Nebraska. Supersedias bond. Filed Jan'ry 29th, 1878. Watson B. Smith, clerk.

(Indorsed:) Sup. Court U. S., 1878. Octo. term. No. 669. The Union Pacific R. R. Co. vs. The Board of County Comm'rs of Dodge Co. Copy of bond. Filed 27 May, 1878.

(Indorsement on cover:) No. 669. The Union Pacific Railroad Company, plaintiff in error, vs. The Board of County Commissioners of the County of Dodge, Nebraska. C. C. U. S. Filed 16th April, 1878.

IN THE

Supreme Court of the United States

No. 669.

THE UNION PACIFIC RAILROAD COMPANY,

Plaintiff in Error,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DODGE,

Defendant in Error.

BRIEF AND POINTS OF PLAINTIFF IN ERROR.

This is an action brought in the Circuit Court of the United States for the District of Nebraska, by the plaintiff in error, to recover from the defendant in error the amount of certain taxes assessed and levied upon certain lands of the plaintiff in error, situated in Nebraska, for the years 1869, 1870 and 1871, and paid under duress and protest. The lands in question became the property of said company by congressional grant by act of July 1, 1862, incorporating and subsidizing the Union Pacific Railroad Company.

The case was by consent of parties tried to the court which found the material facts as follows, Record, page 17:

1st. In 1870 and 1871, the taxes in question were assessed and levied, in conformity with law, provided the lands were taxable; and a warrant was duly made and attached to the tax list, which

authorized the county treasurer to collect the taxes, provided they were valid.

2d. On the 24th August, 1871, the plaintiff paid to the treasurer for county purposes (State and local taxes not included), for taxes assessed and levied in 1870, upon its unpatented lands, the sum of $2,472.68; and on the 20th July, 1872, it further paid to the treasurer for county purposes, (State and local taxes not included), for taxes assessed and levied in 1871, on unpatented lands, the sum of $995 82, making an aggregate for the two years of $3,465.50.

3d. Before the assessing of the lands, there had been paid the land office fees, and the cost of surveying the lands; the plaintiff's railroad and telegraph line, had been so far accepted by the government, that the lands in question and other lands, had been set apart for the plaintiff, and subsidy bonds had been issued; and the plaintiff had offered for sale, and had mortgaged the lands granted to and set apart for it under the acts of Congress, as well unpatented as patented lands.

4th. Patents for the lands on which the taxes referred to were paid, had been and were until after such payment withheld or suspended for the reasons appearing in the report of Commissioners, dated October 30th, 1869, the letter of Secretary of Interior, J. D. Cox, to J. S. Wilson, Commissioner of General Land Office, dated Nov. 3, 1869, and the letter of Secretary of Interior, C. Delano, to Jno. Duff, Vice-President and Acting President of the U. P. R. R. Co., dated Feb. 9th, 1874. Record, pages 20–21.

This reason briefly stated was, that it appeared by said report that the railroad had not been in all respects completed as required by the acts of Congress, and it would require an expenditure of about $1,800,000 to so complete it; and, to secure and enforce a full compliance with such acts, it was ordered that the issuing of patents for one-half the lands which, otherwise, would have been patented, should be withheld until official evidence should be furnished to the land department of such compliance.

5th. At the time of the respective payments, and as a part of the same transactions respectively written protests against the payments

were made and served which are set out in full. Record, pages 18 and 19.

6th. That no formal demand of payment of the taxes or any effort to collect them was made previous to the payment.

7th. That at the time of the proceedings from assessment to payment, the plaintiff had patented lands subject to taxation in Dodge county, and had personal property therein which was liable to seizure for the payment and enforcement of said taxes.

The Statutes of Nebraska bearing upon the questions involved, are as follows:

"The tax list, when completed, shall be kept by the county clerk, as the property of the county; the clerk shall also prepare a duplicate of the tax list for his county, and deliver the same to the county treasurer on or before the first Monday in January following the date of the levy for the current year." Rev. Statutes, page 910, Sec. 35.

"An entry is required to be made upon the tax list and its duplicate, showing what it is, and for what county and year it is, and the county commissioners shall attach to their lists their warrant, under their hand and official seal, in general terms, requiring the treasurer to collect the taxes therein levied according to law; and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal, the county clerk shall take the receipt of the county treasurer on delivering to him the duplicate tax list, with the warrant of the county commissioners attached, and such list shall be full and sufficient authority for the collection by the treasurer of all taxes therein contained." Rev. Statutes, page 912, Sec. 37.

"No demand of taxes shall be necessary, but it shall be the duty of every person subject to taxation under the laws of this State, to attend at the treasurer's office, at the county seat, and pay his taxes, and if any person neglect so to attend and pay his personalty taxes, until after the first day of May next succeeding the levy of the tax, the treasurer is directed to levy and collect the same, together with the costs of collection, by distress and sale of personal property be-

longing to such person, in the manner provided by law for the levy and sale of property on execution, and the treasurer shall be entitled to the same fees for services as are allowed by law to sheriffs for selling property under execution; *Provided*, That in case any person, having personal property assessed, and upon which the taxes are unpaid, shall in the opinion of the treasurer, be about to move out of the county, or in any other manner seek to put his personal property out of the reach of the treasurer, it shall be the duty of the treasurer to collect such taxes, at any time after the tax duplicate has been placed in his hands. In case any person owing taxes remove, the treasurer shall, among other steps to collect such tax, forward, when necessary, such tax claim to the treasurer or tax collector at the adopted residence or place of abode of such tax debtor, and such taxes shall be collected at the latter place, as other taxes, and returned to the proper county, less charges." Rev. Statutes, page 916, Sec. 49.

"On the first day of May of the year after which taxes shall have been assessed, all unpaid State, county, school, precinct, city and village, except city taxes in cities of the first-class, shall become delinquent, and shall draw thereafter one per cent. per month interest, which interest shall be collected the same as the tax so due, and it shall be the duty of the county treasurer, or any other person charged with the collection of the delinquent taxes, to proceed as soon after the first day of May as practicable, to make such delinquent tax out of the personal property of such delinquent, if any such property can be found, and this provision shall apply as well to the taxes assessed on real estate, and remaining unpaid, as to delinquent taxes assessed on personal property; and the remedy to be pursued shall be the same as provided by sections forty-nine and fifty-two of this act; and the treasurer shall be entitled to five per cent. additional compensation for making such collections, to be paid by such delinquent, and also the fees now prescribed by law." Rev. Statutes, page 916, Sec. 50.

Whenever in the collection of any district, town, city or local tax, which may have been levied according to law, the collector is not

able to make the tax by distress and sale of personal property, and real estate is to be sold for the same, it shall be the duty of the collector of the tax to send such delinquent list to the county treasurer on or before the fifteenth day of July of each year, and the county treasurer shall receive the delinquent list and advertise the same at the same time he advertises the sale of real estate for delinquent taxes, as hereinafter provided, by adding the amount of such delinquent district, town, city or local tax, to the amount of delinquent State, county and other taxes, and shall sell such lands for the purpose of paying all such delinquent taxes, as hereinafter directed, and shall credit the proper district, town city or locality, for the amount of taxes so collected, which shall be subject to the order of the proper collecting officer." Rev. Statutes, page 917, Sec. 54.

It will thus be seen that at the date of payment of the respective taxes in controversy, each was delinquent, and that the personal property of the company was liable to seizure therefor, that such power of seizure must be exhausted before real estate could be sold —that no demand was necessary, but that there was in the hands of the treasurer a legal warrant authorizing and requiring him to collect by distress and sale of personal property all delinquent taxes, which might be executed by actual seizure of locomotives, cars, trains, or other personal property, without demand or notice of any kind.

Upon these facts, two questions arise :

FIRST.

Were the lands taxable ?

SECOND.

If not taxable, can the plaintiff, having paid the taxes, recover them back in this action ?

I.

Were the lands taxable ?

The principle controlling the taxability of the lands in controversy was settled in McShane *v.* Railroad Company, 22 Wallace, p. 444.

It was in substance, that when the costs of surveying an entry had been paid by the company, and every other act requisite and neces-

sary to entitle the company to receive a patent, had been performed, the lands become taxable.

In the case at bar, such costs of survey and entry had been paid, but no patent had been issued. On the contrary, the patents were withheld by order of the government, as security for the expenditure of some $1,800,000, declared by a Presidential Commission to be necessary to complete the road to the standard required by law. They are thus clearly brought within the principle, that they are not subject to taxation, until all conditions precedent, and requirements of the government necessary to confer an absolute right to the issue of a patent, have been complied with. The order withholding the issue of patents was made by the Secretary of the Interior, November 3, 1869, (Record, p. 20,) and was never revoked until late in 1874; after another commission had examined and recommended the acceptance of the road. (Record, pages 20 and 21.)

The court below having repeatedly held this class of lands non-taxable, and they seeming to be so clearly within the principle laid down by this court in McShane *v.* Railroad Company, further time will not be spent upon this point.

II.

If non-taxable, are the taxes paid recoverable in this action?

Was the payment by the plaintiff a voluntary payment, so as to preclude a recovery of the money from the county into whose treasury it went?

It may be that the authorities are not altogether in accord upon the question of what constitutes a voluntary payment. Some of them may indicate that there must be either a seizure of property, or a threat of seizure to make the payment a compulsory one. But while in many reported cases there was either an actual or a threatened levy or seizure; and while some expressions of the courts may admit of the construction that nothing short of this is sufficient to make payment of the tax involuntary, yet there are many authorities which require less than this as we will proceed to show; and we feel safe in saying that no case which has fallen under our obser-

vation holds that such facts as appear in this cause make the payment voluntary.

Upon principle, it is not easy to see why the payment of a tax to an officer who has in his hands a process or warrant under which he has the right to seize and sell without demand or notice, and it is his duty to enforce collection by seizing and selling either personal or real property, the payment being accompanied with a distinct written notice that the tax is regarded as illegal, and that suit will be brought to recover back the money, should be deemed a voluntary payment. Nor is it easy to see any well grounded distinction between payment, under such circumstances, and payment when the officer has seized or says he is about to seize property. The enforcement of collection may seem likely to be effected sooner in one case than in the other. But, if, in both, there is the power and the duty to enforce it and the payment is made because it cannot be effectually, or finally prevented, and made with an avowal that the payer protests against it, and insists upon its illegality, and the officer is definitely so notified there can be no substantial distinction in the cases. The party does not, in either case, pay because he chooses to, but because, if he does not, the payment will be enforced at a greater loss or inconvenience to himself than to pay it and sue to get it back.

The circumstances under which courts have held payment compulsory, vary greatly—but the principle is substantially the same. We refer to some of the cases commencing with those in the Supreme Court of the United States.

Elliott *v.* Swartout, 10 Pet, 137, was an action to recover money paid to get possession of property held by a collector.

The party paying it notified the officer, merely, that he would bring suit to recover it back, and that he must not pay it over. The court held this to be sufficient.

Also in Bond *v.* Hoyt, 13 Pet., 263, it is said in the opinion: 'There is no doubt that the collector is generally liable in an 'action to recover back an excess of duties paid to him as col-'lector, when the duties have been illegally demanded and a

'protest of illegality has been made at the time of the pay-
'ment or notice given that the party means to contest the claim,
'whether he has paid over the money to the government or not."

In the City of Philadelphia *v.* the Collector, 5 Wall, 731 the court, p. 731-2, says: "Appropriate remedy to recover back 'money paid under protest on account of duties illegally assessed is 'an action of assumpsit for money had and received. Where the 'party voluntarily pays the money he is without remedy; but if 'he pays it by compulsion of law, or under *protest, or with notice that 'he intends to bring suit to test the validity of the claim,* he may 'recover it back if the assessment was erroneous or illegal, in an 'action for money had and received."

In Collector *v.* Hubbard, 12 Wall., 1, the court says, p. 13: "Prior to the passage of the act of the 13th July, 1866, it is 'quite clear that the tax payer, if he was illegally assessed, might 'maintain an action of assumpsit against a collector to recover back 'the amount if he paid it under protest, although he had not 'taken any appeal to the Commissioner of Internal Revenue."

The act required a certain form of written protest, showing distinctly the grounds of alleged illegality as a condition of bringing suit.

Still stronger is the State Tonnage Tax cases. (12 Wallace, 204.)

It may be suggested as to other cases in the Supreme Court that the taxes on duties were paid, to obtain a release of the property from the collector's possession. But in this case the taxes had been assessed by the State of Alabama upon steamboats. And the owners, without waiting for seizure, so far as the statement discloses, paid the taxes under compulsion and protest, and sued in assumpsit to recover back the money.

The court (p. 209) states the rule thus:

"Where the party assessed voluntarily pays the tax, he is 'without remedy in such an action; but if the tax is illegal, or 'was erroneously assessed, and he has paid it by compulsion of

'law, or under protest, *or* with notice that he intends to insti-
'tute a suit to test the validity of the tax, he may recover it back
'in such an action unless the legislative authority in the
'jurisdiction where the tax was levied, has prescribed some other
'remedy, or has annexed some other condition to the exercise of
'the right to institute such a suit."

We submit that this rule fully sustains the plaintiff's right to recover. If paid the tax with both protest *and* notice of suit.

And in Erskine *v.* Von Arsdale (15 Wall., 75) the C. J. p. 79, says: "Taxes illegally assessed and paid may always be recovered 'back if the collector understands from the tax payer that the taxes 'are regarded as illegal, and that suit will be instituted to compel 'the refunding of them."

The rule thus laid down certainly requires less as a condition of recovery than was done in this case.

This series of cases seems to us clearly to establish as the criterion of the right to sue merely that at the time of payment of an illegal tax, the person paying it shall give the officer distinct notice that he pays it under protest of its illegality, or that he will sue to recover the money—merely that he shall do enough to definitely indicate that it is not a voluntary payment. Whatever the rule is, it, of course, must govern this case.

But we will show that substantially the same principle is sustained by State Court decisions of the highest authority.

Preston *v.* City of Boston (12 Pick., 7) was this case: The plaintiff lived in Medford, but was assessed in Boston on personal property as well as on real estate situated in Boston. He paid to McKay, the Boston collector, his real estate taxes, but objected to paying those on his personal. McKay replied that unless Preston obtained an abatement of such taxes, a warrant of distress must be issued against him, and the taxes be collected. He applied for, but failed to obtain an abatement—and then, without more being done, paid the taxes to McKay, and sued the city to recover back the money.

A principal question was whether this was a voluntary payment.

On that point Chief Justice Shaw said, after discussing what constituted payment under duress:

"The law, under which the treasurer and collector acted, obliged 'him to issue a warrant under which the person and property of the 'plaintiff would have been liable to be taken, and that officer had 'notified him that such warrant would be issued. Under these cir-'cumstances the money was paid, and we think it cannot be con-'sidered a voluntary payment, but a payment made under such 'circumstances of constraint and compulsion, and with such notice 'on his part that it was so paid, that, on showing that he was not 'liable, he may recover it back in this action, from the defendant, 'into whose treasury it has gone."

There, not even a warrant had been issued when the payment was made. There was merely a statement that one would be issued, and a legal duty that it should be. The case goes further than is necessary to show compulsory payment in this.

In Boston and Sandwich Glass Company against City of Boston, 2 Metcalf, 181, illegal taxes were paid and the only protest which appears was made on the day after the taxes became payable, but before the usual summons required by law in case of the non-payment of taxes was issued or issuable. The protest stated merely that plaintiff paid the taxes under duress and not voluntarily, and that he would institute suit to recover back the same. The court, after discussing at length the cases on the subject of compulsory payment held that the payment, in this case was not voluntary, and that the money could be recovered back.

In Joyner *v.* School District, 3 Cushing 567, the warrant had been issued and the collector had threatened to enforce payment of the tax by legal proceedings, but no seizure had been made or steps taken to enforce the tax. The court held that payment under such circumstances was under duress and not voluntary.

In Manufacturing Company *v.* Amesbury, 17 Mass., 460, the court says "the voluntary payment of a part of the tax in this case does 'not affect the right of the plaintiffs to recover the amount of 'money paid by them upon an illegal assessment."

Allentown *v.* Sæger, 20 Penn. State, 421, was a case where part of the tax was legal and part illegal, and the person assessed paid the whole without protest or notice that he would reclaim the part illegally assessed. The court held that under the facts proved he could not recover, but said "if it had been paid under protest, 'that is, with notice that he would claim it back, this would re-'pel the implication of an assent and give rise to the right of 'reclamation."

In Grim *v.* School District, 57 Penn. State, 433, the plaintiff paid taxes under threat of distress, and under protest, no actual levy having been made. The court says "that a party, who, when 'threatened with a distress, pays an illegal tax under protest and 'notice of suit, may maintain an action to recover it back, is settled 'in this state."

Hubbard *v.* Brainard, 35 Conn., 363, was a suit against the collector of United States taxes, to recover $1,597 of taxes illegally assessed, the amount having been paid upon a threat of the collector to coerce collection of the tax, but no seizure of the property had been made. The court held that this was sufficient duress, saying "the unwilling payment of an illegal tax to a collector to avoid 'the seizure and sale of property, is not a voluntary payment."

Bellinger *v.* Grey, 51 New York, 610, was a suit for the wrongful taking and converting of legal tender notes to the amount of $2,-521.81. The facts were that the plaintiff arranged with the collector to pay his tax after 30 days from the receipt of the collector's warrant. Upon the collector calling for its payment, a package containing United States legal tender notes amounting to the plaintiff's tax and the collector's fees was, under plaintiff's direction, laid by his clerk on the counter before the collector. The plaintiff then forbade the collector taking the package, told him his warrant was not right, that he would make himself liable if he took it, and that plaintiff would hold him responsible. The collector then took the package and carried it away. The Court of Appeals, in its opinion, says, "there 'is no color or ground for saying that the plaintiff made voluntary 'payment of the money taken by the collector. The whole course

'of proceeding at the time shows not only that it was not such, but 'that he expressly forbade the taking, and notified the collector that 'he would be made responsible therefor."

A series of cases in California, go as far if not further than those already cited from other States. In Hayes *v.* Hogan, 5 Cal., 241, the collector sold real estate for taxes. The owner protested against the sale and purchased in order to protect his property from a clouded title, and made the payment under protest, and soon afterwards commenced a suit for the recovery of the money. The court held that this was sufficient notice to the officer to hold the fund for his own protection and fixed his liability.

In Gay *v.* Washburn, 23 Cal., 111, the officer being about to sell real estate for taxes illegally assessed and levied, plaintiff came forward and paid his taxes to the collector under protest and brought suit to recover the money. In its opinion the court says: "It is objected 'by respondent that as the property thus threatened to be sold was 'real estate, the payment, though under protest, was in law volun- 'tary, and no action can be maintained to recover it back, as it could 'if it had been a threatened sale of personal property. The right 'of a party who has paid money unjustly to a tax collector under 'protest to recover it by action has been sustained by this court in 'cases both of real and personal property. We are not disposed to 'disturb those decisions, and this point is therefore overruled."

In Michigan the general tenor of the cases is the same.

In the First National Bank *v.* Watkins (21 Mich., 483,) the court states the rule and reason of a protest thus:

"The authorities are quite uniform that when such a demand is 'made under color of office, and the payment is made under pro- 'test, the money may be recovered back, under all circumstances, 'from the persons extorting it. * * The principal object of the 'protest or notice seems to be to warn the officer not to pay over the 'money. * * There is nothing in the authorities to warrant the 'argument that there must be any technical duress. * * No pay- 'ment can be regarded as voluntary, and no one can be regarded as

'unduly negligent in making it, when the party sees fit to comply 'with the illegal demand, while protesting against its illegality."

Atwell *v.* Zeluff (26 Mich., 118,) was a suit where taxes were paid on demand of the collector without waiting the seizure of property. The court said:

"In regard to the payment made without levying on his goods, it 'was objected that the payment being without protest, was volun- 'tary. * Where an officer demands a sum of money under a war- 'rant directing him to enforce it, the party of whom he demands it 'may safely assume that if he seeks to act under the process at all 'he will make it effectual. The demand itself is equivalent to a 'service of the writ on the person. Any payment is to be regarded 'as involuntary which is made under a claim involving the use of 'force, as an alternative; as the party of whom it is demanded can- 'not be compelled or expected to await actual force, and cannot be 'held to expect that officers will desist after once making demand. 'The exhibition of a warrant directing forcible proceedings, and the 'receipt of money thereon, will be in such case equivalent to actual 'compulsion."

In McKee *v.* Campbell (27 Mich., 497,) the court says:

"A party is not bound to wait until a levy is made, but may al- 'ways assume that an officer will enforce his process when he makes 'a demand under it."

In Greenbaum *v.* King (4 Kansas, 332,) the facts were that a temporary injunction was granted by a judge of the district court, restraining a collection of taxes. An appeal from the order was taken to the Supreme Court, which reversed the order, and sent its mandate to the district court. The treasurer thereupon went to the plaintiff's store, and informed the clerks that he had received such mandate, and told them the tax must be paid. They inquired what would be the consequences if it should not be paid. The treasurer replied that in such case he would issue his warrant to the sheriff, who would levy upon and sell the goods in the store. Whereupon the tax was paid by the plaintiff's clerks, and, so far as appears,

without any written protest. The Supreme Court of Kansas held this was not a voluntary payment, and, the tax being illegal, sustained the right to recover of the treasurer.

Upon this subject generally we refer to :

Dillon on M. Corp., 751, *et seq.*
Cooley on Taxation, p. 565, *et seq.*
Baker *v.* Cincinnati, 11 Oh. St., 534.
Hospital *v.* Philadelphia Co., 24 Penn. St., 73.
Taylor *v.* Board of Health, 31 Penn. St. 229.,
Vt. C. R. Co. *v.* Burlington, 28 Vt. St., 193.
Hubbard *v.* Brainard, 35 Conn., 563.
Atwater *v.* Woodbridge, 6 Conn., 223.
Adams *v.* Litchfield, 10 Conn., 127.
Torry *v.* Millburg, 21 Pick., 64.
Dorr *v.* Boston, 6 Gray, 131.
Man. Co., *v.* Pawtucket, 7 Gray, 277.
Covington v. Powell, 2 Met. (Ky.,) 226.
Matherson *v.* Mazomanie, 20 Wis. St., 191.

We have quoted from and stated fully several cases upon the general principle. In some of them there was a threatened seizure of property, in others, not even a warrant had been issued. In some there was an actual demand of payment, in others there was not, but only a power to enforce payment. In some, perhaps most of them, there was power to seize personal property; but in California, in two cases, the taxes were paid to prevent a cloud on the title to real property.

The question involved was considered by this court in a case not yet reported.

Lamborn *v.* County Commissioners, No. 673. Decided October Term, 1877.

I understand it to have been substantially conceded by the court in that case, that under the facts of this case, the payment would have been involuntary, and the amount recoverable. The court say: "It is settled by many authorities that money paid by a per-

son to prevent an illegal seizure of his person or property by an officer claiming authority to seize the same; or to liberate his person or property from illegal detention by such officer, may be recovered back in an action for money had and received, on the ground that the payment was compulsory or by duress or extortion. Under this rule, illegal taxes or other public exactions paid to prevent such seizure, or remove such detention, may be recovered back, unless prohibited by some statutory regulation to the contrary, (Elliott *v.* Swartwurt, 10 Peters, 138; Ripley *v.* Gelston, 9 Johns, 201; Clinton *v.* Strong. Ib., 370; and cases cited in 2 Smith's Lea. Ca., 6 Ed., 468; Cooley on Taxation, 568.)"

In this case, the "officer" not only "claimed" authority to seize the *personal* property of the railroad company, but he was armed with a warrant *requiring* him to seize it before resorting to real estate, and empowering such seizure *without any demand or notice whatever.*

Kansas Pacific Railway Co. *v.* Commissioners of Wyandotte County, 16 Kansas, p. 587, presents the same question, with this difference: In that case no warrant had issued, and the payment was made seventeen days before it was required by law to issue.

In the case at bar, the warrant was out—was in the treasurer's hands—and the inevitable result of non-payment must have been seizure and sale of personal property, which might also be without demand or notice of any kind.

"Where all steps for determining the amount of a tax upon personal property have been taken, the tax roll is complete and in the treasurer's hands, the taxes due, and it is made the duty of the treasurer, at a specified date, to issue a warrant to the sheriff to collect all unpaid taxes on personal property, and the duty of the sheriff, within sixty days thereafter, to levy upon and sell sufficient personal property to pay such taxes, penalty and costs, and no discretion is given to any one to change the amount of the tax, or the time and manner of its collection, a payment to the treasurer of the tax, protesting its illegality, declaring that payment is made solely to avoid the issue of process, and asserting an intention to sue for the sum il-

legally paid, should be considered an involuntary payment—one made to prevent an immediate seizure of the taxpayer's property—although such payment was made seventeen days before the time fixed for the treasurer to issue his warrant."

It is submitted that the application of the principles laid down in Lamborn *v.* County Commissioners must reverse the judgment of the court below.

It is also claimed upon the authority of cases in Massachusetts that because plaintiff had lands in Dodge county which were taxable, the including of others which were not, made a case merely of over-valuation, and therefore the plaintiff's only remedy was to apply to the board of equalization for a reduction of the valuation.

Undoubtedly Massachusetts courts have gone farther than those of other states in the direction of discouraging suits or proceedings to prevent the collection of taxes. And the rulings in question may possibly be affected by the same general policy. But the cases show two things which distinguish the Massachusetts revenue laws from ours.

First. That there was a stringent statute making full and specific provisions for taking errors of valuation and listing to the courts by appeal, and, as we gather from the cases, without access to the Statutes, making this the only remedy.

Second. That, by the Massachusetts system the real estate of the individual was taxed as a whole, or, at least, its valuation was returned as a whole.

By our law, while a person assessed may apply to the board for relief to a certain extent (Sec. 27, page 907, Gen. St.) yet no direct remedy if any at all is given in case the relief is refused.

And clearly the valuation of each specific tract or lot or parcel of of land must be separately stated and carried out opposite to its description, (Sec. 24 page 904–5.) What the person aggrieved would complain of would not—certainly might not—be an over-valuation

but that a particular tract or parcel was not subject to taxation at all, or not to him.

If the Massachusetts doctrine is correct and is applicable here, it follows, logically, that if A. owning a single lot and being satisfied with the valuation placed on it, should, without his knowledge, be assessed as the owner of the State house at Lincoln, or the U. S. Court House at Omaha, and should fail to apply to the board for relief he would be remediless. And if he did not know of the fact he certainly would not so apply. A principle leading to such consequences cannot possibly be sound.

The consideration which controls this case, and meets all difficulties—the question of voluntary payment being out of the way—is that there was no jurisdiction of the property for the purposes of taxation, and therefore all the proceedings, from the assessment to the end, were utterly void.

On this subject it is said in Dillon on M. Corps., 757: "I. The 'authority to levy the tax must be wholly wanting, or the tax itself 'wholly unauthorized, in which case the assessment is not simply 'irregular, but *absolutely void*."

In Cooley on Taxation, p. 528, it is said: "When the tax is illegal, 'one is not obliged to apply for an abatement, *unless the statute 'makes that the sole remedy.* But he may contest the tax when an 'attempt is made to collect it. But for a merely excessive or un-'equal assessment, etc."

Blackwell on Tax Titles, at p. 403, says: "In all cases, if the 'person taxed, or the subject matter of taxation, be not within the 'jurisdiction of the officer who makes the assessment, all subse-'quent proceedings by mere ministerial officers, acting under a 'warrant or other authority to enforce the collection of the tax, 'are deemed utterly void, the assessment being *coram non judice.* 'The owner is not bound to enjoin the sale of his land under 'such circumstances, or resort to his remedy against the officers, 'but may contest the validity of the sale whenever the purchaser 'or his grantee attempts to recover the possession or establish his 'title to the land."

In Hospital *v.* Phil. Co., 24 Penn. St., 229, the court says: "An unjust assessment of taxes is in general to be remedied by 'an appeal to the county commissioners. * * The act of 1836, 'giving the appeal, does not seem intended for cases of persons or 'property not liable to assessment at all." After discussing cases in other States, the court proceeds: "The same rule ought to apply 'to the case of an assessment of property not liable to assessment. 'In the one case, there is no jurisdiction over the party; and in 'the other, none over the property. The principle is the same in 'both cases, and it has been applied in the investigation of land 'titles under sales for non-payment of taxes. In all cases where '*seated* property has been assessed as *unseated*, the titles derived 'under such proceedings have been declared invalid."

On this point we also refer the court to the case of National Bank of Chemung *v.* City of Elmira, 53 New York, 49, in which C. J. Church discusses at length the jurisdiction of taxing officers, referring to many authorities.

The question was whether the assessment of certain property of the bank in which its capital had been invested, was within the jurisdiction of the State local assessors. The judge says: "It is claimed that the assessors had jurisdiction to make the assessment; that their act was judicial, and although erroneous, is conclusive until reversed by a direct proceeding instituted for that purpose. This proposition cannot be predicated of this case, either in fact or in law. * * It is argued that they have jurisdiction to determine what property is taxable in the town. This is a mistake. The legislature determines that question, and the officers have no power over it. * * Assessors must have jurisdiction over the person and subject matter. The person must be an inhabitant of the town, and the property must be taxable, otherwise the assessment is illegal and void. The legislature has declared that the capital of National Banks is not taxable property. The assessors therefore have no jurisdiction over it."

To insist that by any action or want of action on the part of the county officers, the plaintiff or any individual can be com-

pelled to pay taxes on lands belonging to the United States, seems to us an absurdity which no argument can relieve.

Upon the general question of jurisdiction, see further:

Mygatt *v.* Chenango Co., 11 N. Y., 563.
Mygatt *v.* Washburn, 15 N. Y., 316.
Whitney *v.* Thomas, 23 N. Y., 281.
Chapman v. Brooklyn, 40 N. Y., 372.
Hobson *v.* Dutton, 9 Kans., 477.
Allen *v.* Burlington, 45 Vt., 202.
State *v.* Major, 35 N. J., 381.
Bassett *v.* Porter, 4 Cush., 487.
Dickenson *v.* Billings, 4 Gray, 42.
Freeman *v.* Kennedy, 15 Pick, 44.
Martin *v.* Mansfield, 4 Mass., 419.
Summer *v.* First Parish, 4 Pick., 361.
Ingler *v.* Bosworth, 5 Id., 498.
Hardy *v.* Waltham, 7 Id., 108.
Bott *v.* Perly, 11 Mass., 169.
Rome *v.* Blakesley, 11 Conn., 479.
Brewster *v.* Hough, 10 N. H., 138.
Coney *v.* Owen, 6 Watts, 435.
Downs *v.* Strickland, 57 N. Y., 492.
Ware *v.* Percival, 61 Me., 391.

Why should not the plaintiff recover?

The lands were not taxable, and there was no consideration for the payment of the taxes.

The warrant requiring the treasurer to make the taxes by sale of personal property if it could be found, if not, by selling plaintiff's lands, in which it had an equitable title, was in the hands of the treasurer, and required him to seize and sell the personal property of the company for payment, and *empowered* him to make such *seizure without demand or notice.*

There was no doubt that the personal property would have been sold, but for payment of the illegal taxes.

To prevent the damage incident to such seizure, the company paid the taxes.

But to avoid any misconstruction it made a written protest, and distinctly notified the officer that suit would be brought to recover back the money.

The county took and spent this money unjustly taken from the company. Why should it not be refunded?

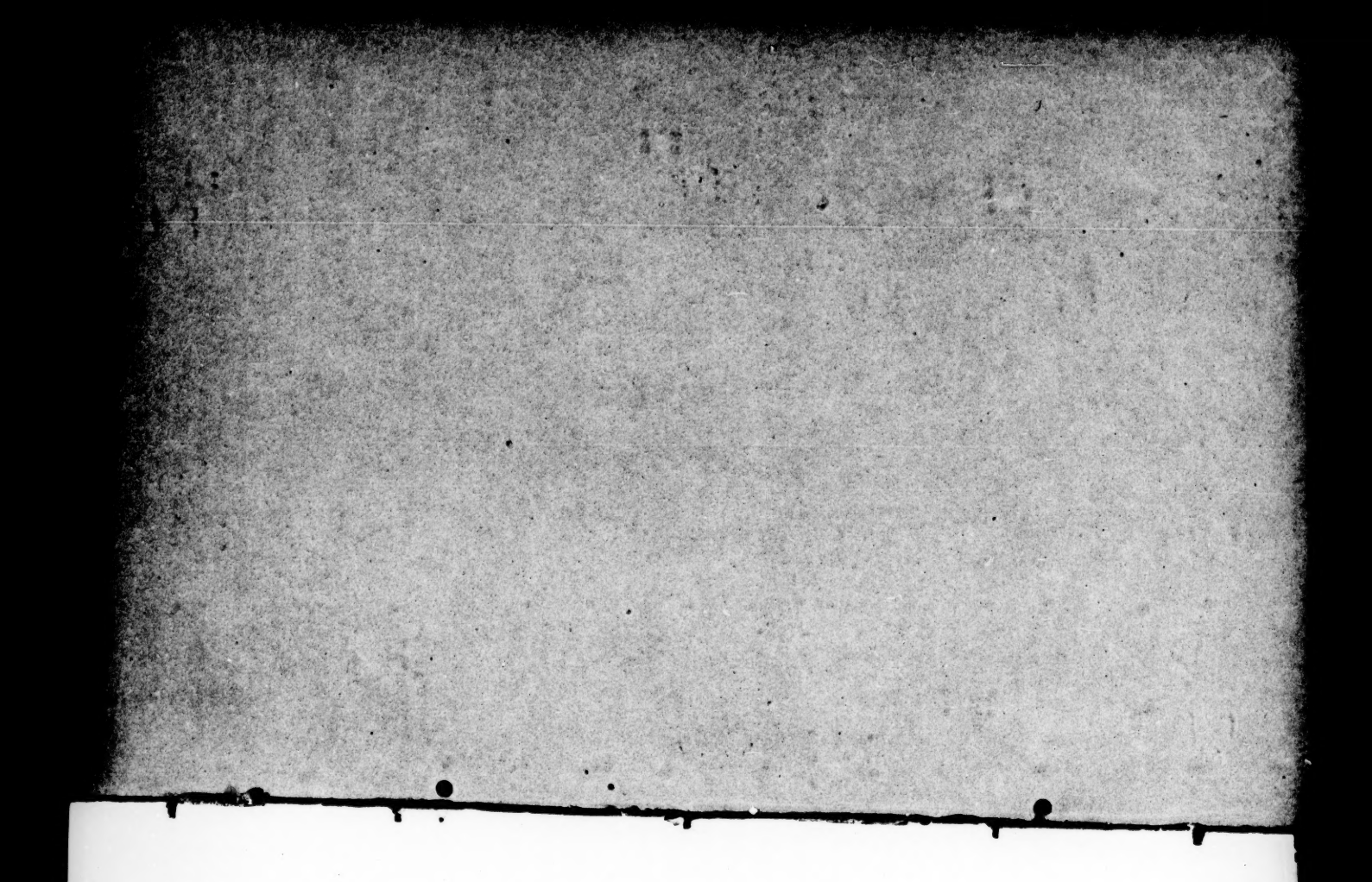
To say that more might have been done by the plaintiff in error to avoid the payment, is to suggest a bounty on litigation to escape taxation in every doubtful case.

The company is a very large tax payer in Dodge and other counties. If it enjoins taxes, or otherwise hinders their prompt collection, it is denounced as unwilling to meet its just burdens, and trying to embarrass new and impoverished municipalities. If it pays illegal or doubtful taxes under protest, and establishes their illegality beyond question, in a court of justice, it is coolly told that it was its own folly to pay them, and it is entitled to no remedy.

I submit that the company is fully within the rules which protect the payer of illegal taxes, and on all just principles is entitled to recover.

A. J. POPPLETON,

Counsel for Plaintiff in Error.



IN THE

SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILROAD COMPANY,

PLAINTIFF IN ERROR,

v.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DODGE,

DEFENDANT IN ERROR.

OCTOBER TERM, 1878.

BRIEF OF DEFENDANT IN ERROR.

J. M. WOOLWORTH,
OF COUNSEL.

W. H. MUNGER,
ATTORNEY.

GEO. W. GRAY, Printer, Omaha, Neb.

THE UNION PACIFIC RAILROAD COMPANY,

PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DODGE,

DEFENDANT IN ERROR.

STATEMENT OF CASE.

This action was brought in the Circuit Court by the Plaintiff in Error, to recover of the defendant the sum of $18,164.64 with interest, being the amount paid by said Railroad Company to the Treasurer of said county as taxes assessed for the years 1869, 1870, and 1871, upon certain lands within said county, granted to said Company by an act of Congress of the United States, approved July 1, 1862, entitled "An Act, to aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," and the Act amendatory thereof, approved July 2, 1864.

Plaintiff, to maintain its right of action, says:

FIRST.—That said taxes were illegal for the reason that said lands were not subject to taxation.

SECOND.—That it made payment of such taxes involuntarily and under protest.

The defendant, to defeat plaintiff's action, says:

FIRST.—That said lands were subject to taxation.

SECOND.—That plaintiff waived its right to complain, in

not bringing the matter to the attention of the County Board of Equalization.

THIRD.—That plaintiff paid such taxes voluntarily.

FOURTH.—That no sufficient protest was made.

Without attempting to give a statement of the facts upon which plaintiff and defendant rely to sustain their several positions, I call the attention of this Court to the several findings of fact by the Circuit Court, on pages 17, 18, 19, 20 and 21, of the printed record.

FIRST POINT.

Repeated adjudications have been made that where lands have been fully earned from the United States, so as to entitle the party to a patent, such lands are subject to taxation even though no patent has in fact been issued.

In the case at bar, had the lands in question been fully earned by plaintiff before the assessment and levy of said taxes?

The 4th Section, of said act of Congress, provides that patents shall issue to said Railroad Company whenever said Railroad shall have been constructed in the manner therein specified and accepted by the President of the United States. By the 21st Section, of the Amendatory Act of 1864, before said lands should be conveyed, the said Railroad Company was required to first pay into the Treasury of the United States, the costs of surveying, selecting and conveying such lands.

Two things, then, were necessary to have been done to entitle said Railroad Company to its patents.

FIRST.—The construction of said road and its acceptance by the President of the United States.

SECOND.—The payment of the costs of surveying, selecting and conveying said lands.

Had these two things been done prior to the assessment of said taxes?

The 9th finding of fact by the Circuit Court, (page 19, printed record), is as follows:

"That previous to the time of assessing of said lands, there had been paid, the land office fees, and the costs of surveying of said lands, and the plaintiff's Railroad and Telegraph line had been accepted by the Government of the United States under the 4th Section of the act of Congress of the United States, entitled "An Act, to aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes." Approved July 1, 1862, "so far that the subsidy bonds of the United States were issued therefor, and the lands were set apart, or reserved. But patents therefor had not been issued, and were withheld until after the payment of said taxes.

Here, then, we have a finding that the facts existed which gave to the Railroad Company the right to patents for said land. It is true that by the 21st Section of the Amendatory Act, of 1864, the costs of *surveying, selecting and conveying* such lands were required to be paid, while the facts, as found, show that the costs of *surveying and the land office fees* were paid, the question presents itself, do the land office fees cover and include the costs of selecting and conveying, or in other words, did the payment of costs of surveying and land office fees fulfill the requirements of said amendatory act of 1864. This question was discussed by Mr. Justice Miller, in the case of Hunnewell v. Cass County, 22 Wall, 464; and, we think, fully decided in the affirmative.

But, the patents were withheld by the government, and why?

The 10th finding of fact, (printed record, page 19), says:

That the patents were withheld as aforesaid, by reason of the joint resolution of the Congress of the United States, for the protection of the interests of the United States in the Union Pacific Railroad Company, the Central Pacific Railroad, and for other purposes, approved April 10th, 1869, and of the report of Hiram Walteridge, F. M. Fenton, C. B. Comstock, E. F. Winslow and J. F. Boyd, Commissioners under said resolution, which report is set forth in executive document No. 90, of the second session of the 41st Congress, reported to the Senate of the United States, which may be offered at the trial, and a letter of instructions, transmitted by J. D. Cox, Secretary of the Interior, to Joseph L. Wilson, Commissioner of the General Land Office of the United States, dated November 3, 1869, a copy of which is as follows: * * * * * * * * * and of a letter of the Secretary of the Interior, Columbus Delano, addressed to John Duff, Vice President and acting President of the Union Pacific Railroad Company, and dated the 9th day of February, A. D. 1874, a copy of which is as follows: * * * * * * * * * * * * * *

The facts then, show that the only reason why such patents were withheld, was because of said joint resolution and the two letters above referred to. The letters are based upon said joint resolution and could have had force only as based on said resolution. Did, then, said resolution authorize or permit the withholding of patents for said lands. The 3d Section of said resolution is the only portion that authorizes the withholding of any security, and is as follows:

SEC. 3. *And be it further Resolved*, That the President is hereby authorized and required to withhold from each of said Companies an amount of subsidy bonds, authorized to be issued by the United States, under said Acts, sufficient to secure the full completion as a first-class road; of all sections of such road, upon which bonds have

already been issued, or in lieu of such bonds, he may receive as such security an equal amount of the first mortgage bonds of such Company, and if it shall appear to the President that the amount of subsidy bonds yet to be issued to either of said Companies is insufficient to insure the full completion of such road, he may make requisition upon such Company for a sufficient amount of bonds already issued to said Company, or in his discretion of their first mortgage bonds to secure the full completion of the same.

And, in default of obtaining such security, as (is) in this Section provided, the President may authorize and direct the Attorney General to institute such suits and proceedings on behalf and in the name of the United States, in any Court of the United States having jurisdiction, as shall be necessary or proper to compel the giving of such security, and, thereby, or in any manner otherwise, to protect the interests of the United States in said road, and to insure the full completion thereof, as a first-class road as required by law, and the Statutes in that case made." U. S. Statutes at large, Vol. 16, page 56.

Nowhere in said resolution is any reference made, directly or by implication, to any of the lands granted to said Railroad Company, and if no authority existed to withhold the patents, if they were withheld by the wrongful act of the officers of the Government, this fact would not affect the rights of the Railroad Company to the lands, or, its present rights to a patent therefor, nor prevent their taxation by the State Government. It is, however, claimed on the part of Plaintiffs in Error, that these lands were held non-taxable by this Court in the case of Railroad Company v. McShane, 22 Wall., 444, but we discover nothing in the record which discloses that the lands in controversy, in the case at bar, were the same lands mentioned in that case. On the contrary, the facts show that the two cases are entirely dissimilar. In the McShane

case, the facts were that the land office and survey fees were not all paid, and it was for that reason that the Court held the land not earned, and consequently, not taxable, while, as we have seen in the case at bar, the fees had all been paid and the lands fully earned. In other words the Circuit Court has found in this case the existence of those facts; the non-existence of which, formed the basis of the decision of the Court in McShane's case.

SECOND POINT.

The second ground of objection made, that plaintiff cannot maintain this action, arises from the fact that the legislature of Nebraska has provided a special remedy whereby persons aggrieved in the listing or valuation of their property, may have the same corrected. On page 301 of the Revised Statutes, Sec. 27, (which was the law at the time of the assessment, levy, and collection of the taxes complained of), is the following: "The county commissioners of each county shall constitute a board of equalization for the county, * * * * and during the sitting of said board, any person feeling aggrieved by anything in the assessment roll, may apply to the board for the correction of any supposed error in the listing or valuation of his property, whether real or personal."

Here we find a full, complete and adequate remedy provided by the statute; and it is upon both principle and policy, as well as from authority, "That when a statute in relation to revenue provides a tribunal for the correction of the errors of revenue officers by proceedings in the nature of an appeal to it, such *quasi appellate* jurisdiction is exclusive."

Marklot vs. the City of Davenport, 17 Iowa, 379.

In Osborn vs. Inhabitants of Danvers, 6 Pick., 98, the Court says: "This is an adequate and convenient remedy, but great mischief would follow, if we were to hold

that an excess of valuation would render an assessment illegal and void, and it is immaterial whether the excess is caused by including in the valuation property of which the person taxed is not the owner, or that for which he is not liable to be taxed. In both cases the remedy is the same. As the plaintiff was liable to taxation for his personal property, the assessment was valid, although he was assessed for more than his due proportion. His only remedy is by application for an abatement; for when a new right is created by statute, which at the same time provides a remedy for any infringement of it, that remedy must be pursued.

In Hughes vs. Kline et al. 30 Penn., State, 227, the Court says: "The legislature has thought proper to place the assessment and collection of taxes in the hands of county and township officers, and has constituted the county commissioners generally the appellate tribunal for the correction of assessments. * * * * The proceedings are to be in all cases as of necessity, summary; otherwise the raising the means for carrying on the municipal business of the counties might be greatly retarded and the public interests much prejudiced. Wherever this power of revision has been reposed, in addition to the necessity of the process being summary, for the same reason its action is to be final and conclusive. * * * * To such tribunals constituted for the purpose, parties dissatisfied on account of excessive taxation must appeal."

In Doane vs. Todd et al., 32 Mo., 90, the Court says: "It was fit that a remedy should be provided to correct the errors of the assessor, but the necessities of the case required that it should be a speedy and summary one, and such a remedy has accordingly been provided, and must be considered as exclusive. * * * * The assessment may be erroneous, but, if it be, we cannot remedy it without overturning fundamental legal principles, and the party, therefore, must apply elsewhere for relief."

In the case of S. C. & P. R. R. Co. vs. Washington County, 3 Neb., p. 40, Justice Gantt, speaking of the powers and jurisdiction of the county commissioners, says: "The power to correct errors and grievances in respect to the assessment of taxable property is vested exclusively in the board of equalization, and the nature and character of the functions of this board show clearly that it acts judicially."

Mr. Justice Clifford, in State Tonnage Cases, 12 Wall., on page 209, says: "Assumpsit for money had and received is an appropriate remedy to recover back moneys illegally exacted by a collector as taxes, in all jurisdictions where no other remedy is given, * * * he may recover it back in such an action, unless the legislative authority in the jurisdiction where the tax was levied has prescribed some other remedy." (And on page 223, same case, the Judge seems to revert again to the same question).

Mr. Cooley, in his work on taxation, on page 528, says: "The abatement may be total when one is unlawfully taxed, or taxed for exempt property, or property he does not own, or it may be partial when the complaint is only that the valuation is excessive. In either case one applying for an abatement must comply strictly with the provisions of the statute which confers the right." (See cases there cited).

From the foregoing authorities, we think the law clearly establishes the rule that when the legislature has provided a special tribunal for the correction of errors in matters of taxation, the person aggrieved must apply to such special tribunal, and, if he fail to do so, he loses all right to complain afterwards. But it will doubtless be contended by counsel for plaintiff that this rule only applies in cases where the assessment is one of overvaluation, and not to a case where the tax is wholly void. Assuming this to be true, we contend that in the case at bar, it was as between

the plaintiff and the county only an overvaluation. The facts show that the plaintiff had other lands in the county which were subject to assessment and taxation, and which were duly and legally taxed. This then gave the revenue officers jurisdiction to assess a real estate tax against plaintiff, and under the statute all real estate is taxed against the owner.

If, then, in cases where the assessors have jurisdiction to assess a tax against a person upon his personality, and the assessor includes in his enumeration of property articles which are not subject to taxation or which the party does not own, it is regarded as an overvaluation simply, as is shown by the authorities before cited. Do not the same reasons apply with equal force in regard to real estate? That when the assessor has jurisdiction to assess a real estate tax against a person, and the assessor includes in his return real estate of which the party is not the owner or which is not subject to taxation, it is the same as regards personality,—an overvaluation merely. Such is the case, says the Court in Howe vs. the City of Boston, 7 Cushing, 273, which was a case in all respects like the one at bar. Plaintiff was a resident of the city of Boston, and was legally assessed therein for personal estate, and also for a certain dwelling house and parcel of land of which he was the owner. In addition thereto he was assessed for sixteen lots of land situated in Boston, which was the property of the United States. These lots he had agreed to purchase, and had paid an instalment of the purchase money, but no deed therefor had been given to the plaintiff, he not being entitled thereto until he had made further payments. The action was brought to recover back so much of the tax assessed and paid by plaintiff on the real estate as was assessed on said sixteen lots of land, on the ground that they were the property of the United States, and by law exempt from taxation. The learned Judge in that case says: "The rules of law of which the validity of the tax

are tried are the same as respects both (real estate and personality), and, in order to render the whole tax invalid on either kind of property, so as to recover it back after payment by compulsion, it must be made to appear that the party aggrieved was not liable to assessment for any part of that class or subject of taxation of which he complains. * * * * The rule is that the whole real estate in the same town or city constitutes, as between the taxpayer and the town or city, but one subject of taxation, and, therefore, when the taxpayer has cause for complaint that his tax is too large, his only remedy is by application to the assessors for abatement, and, on their refusal, by an appeal to the mayor and aldermen or county commissioners, in the manner prescribed by statute."

If this were a case to determine whether the tax was a lien upon the real estate assessed, we should yield at once to the rule that if the land was not subject to taxation, then the officers had no jurisdiction to charge the land with the tax lien. But what we contend for is that, as between plaintiff and defendant, the revenue officers had jurisdiction to levy a real estate tax against plaintiff; that, although it was greater than its due proportion, because of including its real estate not taxable, yet, as regards plaintiff, it was simply an overvaluation, for which plaintiff had a full, complete, and adequate remedy by appeal to the county board of equalization. If it obtained no redress for its grievances there, it could have prosecuted a petition in error, through the courts, to the court of last resort. This right is given them, says the Court in S. C. & P. R. R. Co. vs. Washington County, 3 Neb., 30.

THIRD POINT.

Was the payment voluntary or involuntary? If the former, no recovery can be had. Upon this point there is no conflict among the authorities. What, then, constitutes an involuntary payment?

In Phillips vs. the Board of County Commissioners of Jefferson County, 5 Kan., 412, a case where plaintiff's lands, which were not subject to taxation, had been sold, and plaintiff paid the money to prevent tax deeds, which were then due, from being made, but protested at the time of such payment, on the ground that the lands were not taxable. Yet, the Court held that the payment was a voluntary one, and plaintiff could not recover the money back.

And in Wabaunsee County vs. Walker, 8 Kan., 436, plaintiff brought suit to recover taxes paid, which were admitted to be illegal, and at the time of payment a written protest was filed with the treasurer. The payment was held to be voluntary, and no recovery could be had. Valentine, Judge, said: "Where a party pays an illegal demand, with a full knowledge of all the facts which render such demand illegal, without any immediate and urgent necessity therefor, or unless to prevent an immediate seizure of his person or property, such payment must be deemed to be voluntary, and cannot be recovered back, and the fact that the party, at the time of making the payment, files a written protest, does not make the payment involuntary." To the same effect is the case of Jenks vs. Lima Township, 17 Ind., 326. In Edston et al. vs. the City of Chicago, 40 Ill., on page 518, the Court says: "We find then there was a regular judgment against this property, and that the plaintiff owning it, voluntarily, and not under process by one of the parties in interest, paid this money; and we know of no principle of law that can be invoked in their favor to compel the city to pay it back to them. Although the judgment may be void, still the payments made by plaintiff were voluntary. They were made with a full knowledge of all the facts and circumstances of the case, in ignorance only of their legal rights, without fraud, imposition, or any undue advantage taken of them, and really for an object they had originated, and

the accomplishment of which has benefitted their estate. No case can be found where money has been voluntarily paid, with a full knowledge of the facts and circumstances under which it was demanded, which holds that it can be recovered back upon the ground that the payment was made under a misapprehension of the legal rights and obligations of the parties paying; and it is invariably held that a payment is not to be regarded as compulsory, unless made to relieve the person or property from an actual and existing duress, imposed upon him by the party to whom the money is paid; and such is the tenor of all the cases cited by appellants from Valley vs. Bate, 50 Eng., C. L., 602, to Lazell vs. Miller, 15 Mass., 207. No well considered case anywhere has proceeded upon different principles."

What are the facts in the case at bar? Plaintiff says that the lands were not subject to taxation, because all the condition precedent to be performed on its part before the United States should be required to convey to it the title, had not been complied with. There is no claim that the plaintiff was not acquainted with and had full knowledge of all the facts which rendered the tax illegal; but, on the contrary, the very nature of the case dispels any doubt that they had such knowledge. With full knowledge then, of all the facts, it voluntarily appears before the county treasurer, without any demand or even mild request for it so to do, and pays its taxes in toto,—taxes regarding which there is no question regarding the legality as well as those in controversy. Can the simple fact that they protested at the time of payment bring the case within the rule constituting an involuntary payment? Most certainly not; and without stopping to enumerate all the cases establishing this doctrine, we will take only the recent case of Stephen, treasurer, etc., vs. Daniels, et al., 27 O. S., 527, a case in which a recovery was had (although under the provisions of the statute, and not applicable here only so

far as legal principles are enunciated), and which will doubtless be referred to by plaintiff. On page 543, after a full review of the authorities, the Court says: "It will be seen from these authorities that payments under process of law are not voluntary if made upon a demand by an officer having the power and charged with the duty of enforcing the process." Apply the rule then, *e converso*, and the payment will be voluntary if made to the officer without any demand, and without power of forcing a demand. What then, is essential to render the payment involuntary? We answer: "An illegal demand coupled with the power to enforce such demand, that the demand and power to enforce must co-exist will be readily seen from the following illustration. Suppose "A" demands of "B" the payment of a sum of money, having no power or authority to enforce such demand, and "B" responds with payment. It cannot and will not be contended that such payment was involuntary, and that "B" could recover the money back. On the other hand, suppose "A" pays "B" (who has power to enforce a demand) a sum of money, when no demand is made, and no threat or intimation of a demand is made, can this be called involuntary? It seems to us clearly not, and we venture the assertion that counsel for plaintiffs will not and cannot present a single case in which recovery has been had (unless under the provisions of a special statute), in which payment was made without any request for the same.

FOURTH POINT.

Was the protest sufficient?

In Thompson vs. Maxwell, 2 Blatchford 385, the Court says: "It is most reasonable that a public officer should be put on his guard against a mistake or error in the exercise of his functions, prejudicially, to another who is cognizant of the error, and intends to hold him responsible for it by an explicit notice from such person to him of his error, in fact or in law. He might thus at once correct the

wrong without delay or expense to either party. * * * The party who offers his goods for entry has the means of ascertaining at once whether any well founded objection exists for contesting the legality of the rate of duties demanded at the custom house, and if he neglects to lay these objections before the collector, or omits to make the inquiries necessary to his own information on the subject, it is right that the loss resulting from his inattention or remissness should be borne exclusively by himself. We understand the act of 1845 to be imperative in its character. But independently of the solicitude of the Court to execute faithfully all the directions of a public law, *we are convinced that on general principles a peremptory law of that character will prove to be not less salutary, and important to the navigation and trade of the country, than to the fiscal operations of the government.* We shall persevere in applying the rule adopted in the present case, to all others coming before us for judgment, and *in holding that the claimant must, in his protest, point out to the collector by positive and direct notice, every particular of fact and of law which he relies upon as protecting his goods from the payment demanded.*"

And in Curtis' Adm. vs. Feidler, 2 Black, 480, Justice Clifford says: "Iron in bars, as well as hemp in bundles, is included in the entry, and yet the protest is 'against the payment of the duty charged in the entry, without any discrimination as to the packages, and, consequently, applying as well to the iron as to the hemp, and to the whole amount of duties charged upon the entire importation. No pretense is now made that the duty charged upon iron was illegal or excessive, and the plaintiff concedes that the hemp was subject to a duty of $25.00 per ton. Irrespective of authorities, therefore, it is impossible to hold that the protest in this case is sufficiently distinct and specific to admit the objection to the payment set up at the trial. * * * Persons importing merchandise are required to

make their protest distinct and specific, to apprise the collectors of the customs of the nature of the objections made to the payment of the duties, before it is too late to remove them or modify the charge, and in order that the officers of the government may know what they have to meet in case they decide to exact the duties notwithstanding the objection and expose the government to the risk of litigation.'"

In the case at bar, the facts show that plaintiff paid its taxes at the same time and in the same manner upon its lands and other property which was taxable, yet the protest is against the taxes upon all their lands and property within the county, and, for the reason given in the above cases, plaintiff cannot recover. It will doubtless be said that the act of Congress required the protest to specify the objections. Even so. Yet, the reasons assigned for holding a party to a strict conformity with the statute, apply with equal force in this case.

But this rule, that the protest must specify specifically the grounds of the objection, is the same, although there be no statute upon the subject.

In Meek vs. McClure, 49 Cal., 623, the Court says: Wherever a protest is essential, it is therefore necessary to state the grounds upon which the party paying the money claims that the demand is illegal. The statement of the precise amount which is claimed to be illegal, when a part of the demand is legal, is of but little moment, for that, as in this case, can readily be ascertained by the official to whom the money is paid, upon being informed of the ground upon which payment would be refused, except for the coercion or duress. In this case the defendant was not informed by the protest that the plaintiff claimed that the action of the board of equalization was void, and there was nothing in the assessment roll or other documents which came to the hands of the defendant, as the tax collector, which would impart notice to him that

the action of the board of equalization in increasing the valuation of plaintiff's property was void, because the order was made without any complaint being filed before the board, stating that the valuation was too low. The protest, in our opinion, was not sufficient to entitle the plaintiff to maintain an action to recover back the amount paid on account of the increase of the valuation of the property.

EQUITIES.

We say the equities of this case are with defendant. The lands in question were part of a bounteous gift to the plaintiff. The facts show that plaintiff was enabled to and did, on the strength of its title to these lands, acquire large advancements of credit. They enjoyed the benefits to be derived to as full an extent as if all interest of the government had passed. If the title had not fully vested in plaintiff it was owing to the latches and neglect of plaintiff in fulfilling the requirements of law, on its part to be performed. Had the plaintiff performed its duty, these lands would have been subject to taxation. It has been said that if a man has paid what the law would not have compelled him to pay, but what, in equity and good conscience he ought, he cannot recover it back again, such seems to be the case with plaintiff. It says the law would not have compelled it to pay the taxes upon these lands, because it had not complied with its part of the contract. Equity says that, while this is true, you have had the full enjoyment of these lands, and good conscience requires that you assist in due proportion in maintaining the government. You cannot now complain by setting up your own lack of good faith. Actions of this character are equitable in their nature (Dillon on Municipal Corporations, Sec. 751,) and to obtain equity one must do equity.

To recapitulate, then, we say that plaintiff cannot recover, and the judgment of the Circuit Court was right:

FIRST.—Because the lands were subject to taxation, having been fully earned, by the Railroad Company.

SECOND.—Because the statute has provided an ample and convenient remedy, which must be regarded as exclusive and not cumulative :

Marklot vs. City of Davenport, 17 Iowa, 379.
Osborn vs. Danvers, 6 Pick, 98.
Hughes vs. Kline, 30 Pa., State 127.
Doane vs. Todd, 32 Mo., 90.
Howe vs. City of Boston, 7 Cush., 273.
Emery vs. Bradford, 29 Cal., 86-87.
Canlin vs. Seaman, 22 Cal., 549.
Nolan vs. Reese, 32 Crl., 487.
Williams vs. Holden, 5 Wind., 227.
Peora vs. Kidder, 26 Ill., 358.

THIRD.—Because the payments made in the manner and under the circumstances, as in this case, can only be regarded as voluntary payments; while to entitle a party to recover back money paid, the payment must have been made *upon compulsion*, to prevent the immediate seizure of his goods or the arrest of the person.

Dillon on Municipal Corporations, 751.
Baltimore vs. Lefferman, 4 Gill, (Md.) 425.
Town Council vs. Burnett, 34 Ala., 400.
Lee vs. Templeton, 13 Gray, 476.
Smith vs. Readfield, 27 Maine, 147.
Elliott vs. Swartout, 10 Pet., 131.
Wabaunsee County vs. Walker, 8 Kan., 436.
Jenks vs. Lima Township, 17 Ind.. 326.

FOURTH.—Because the protest in this case, being general a protest against the whole tax, that which was legal as well as the illegal, is not such a protest as the law recognizes as sufficient:

Thompson vs. Maxwell, 2 Blatchford, 385.
Curtis vs. Feilder. 2 Black, 461.
Meek vs. McClure, 49 Cal., 623.

W. H. MUNGER,
Attorney for Defendant.

J. M. WOOLWORTH,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

v.

THE BOARD OF COUNTY COMMISSIONERS OF DODGE COUNTY, NEBRASKA.

There are pending in the United States Circuit Court for the District of Nebraska ten or twelve suits brought by the plaintiffs in error against as many counties to recover back taxes paid on its land grant, involving the questions raised in this case. As I in part represent these counties, the attorney for the defendant has kindly consented to the filing in this case of the following suggestions, and with the permission of the Court I will do so; though in view of the able and convincing brief filed by the defendant, it is hardly necessary.

In the Court below the plaintiff relied upon decisions of this Court to sustain its right to recover back these taxes. Probably the same decisions will be cited by it here, but we think they have no application to this class of cases.

These cases, with perhaps one exception, arise under specific provisions of acts of Congress relating to custom or internal revenue duties, and the court was not called upon to consider the common

law rule, as it will be compelled to do in this case. We will briefly notice these cases and the acts of Congress.

The first case that came before the Court was Elliott *v.* Swartwont (10 Pet., 130), on certificate of division, and the Court says:

"The case put by the third point is where, at the time of the payment, notice is given to the collector that the duties are charged too high, and that the party paying so, paid to get possession of his goods, and accompanied by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid, and notice given him not to pay it over to the treasury." The Court answers in the affirmative, and cites English cases in support of this rule.

The Court further says, approving the English rule: "In the case of Snowden *v.* Davis (1 Taunt., 358), it was decided that an action for money had and received would lie against a bailiff to recover back money paid through compulsion, under color of process, by an excess of authority, although the money had been paid over. The Court says the money was paid to the plaintiff under the threat of distress; and although paid over to the sheriff, and by him into the exchequer, the action well lies; the plaintiff paid it under terror of process *to redeem his goods.*"

This case of Elliott *v.* Swartwont was decided in 1836, and was not controlled by any act of Congress, but was based upon the principles of the common law.

In 1839 (R. S. 583) Congress, probably in view of this decision, passed a law requiring the collector to pay all moneys into the treasury, whether there had been protest against the payment or not, but authorizing the secretary to refund moneys wrongfully collected.

After the passage of this law, and in 1845, the case of Cary *v.* Curtis, (3, How. 236–251) came before the Court. The Court held, because of that act, no action could be maintained against the collector, but that the only remedy the importer had was by appeal to the secretary of the treasury. The same year, 1845, Congress passed this act: "Any person who shall have made payment under protest,

and in order to obtain possession of merchandise imported by him, to any collector of moneys or duties, when said amount of duties was not, or was not wholly authorized by law, may maintain an action at law, triable by jury, to ascertain the validity of such demand, and payment of duties, and to recover back any excess so paid. But no recovery shall be allowed in such action unless a protest in writing, and signed by the claimant or his agent was made and delivered at or before the payment, setting forth distinctly and specifically the grounds of objection to the amount claimed."

(R. S., 583.)

This act made a radical change in the law; it restored the action against the collector, and so far modified the rule in Elliott *v.* Swartwont, as to entitle the plaintiff to recover, when he had paid an illegal tax or exaction, provided he made at the time the necessary protest.

In Nichols *v.* United States (7 Wal., 130), speaking of the legislation on this subject, the Court says: "Congress has from time to time passed laws on the subject of revenue which not only prescribe the manner of its collection but also point out a way in which errors can be corrected. These laws constitute a *system* which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exaction of duties. In the administration of the tariff laws, as we have seen, the secretary of the treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with the decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment. An equal provision has been made to correct the errors in the administration of the internal revenue laws."

Also the case of Sturgis *v.* Collector, (12 Wal., 24) is based solely on the Custom Laws, and several other cases not necessary to cite.

In respect to cases arising under the internal revenue, the Court says (in Collector *v.* Hubbard, 12, Wal. 12): "But the right of the plaintiff to recover in such a case, if the tax is illegal, * * does

not depend alone on an implied promise, as at common law, as the act of Congress, which requires the collector to collect and pay the money into the treasury contains other provisions from which the implication necessarily arises, that the taxpayer in such a case, if the tax is illegal may maintain an action against the collector to recover back the amount. * * The right of action, though in from an action of assumsit, is *grounded upon the act of Congress.*

(R. S., 622–623.)

Counsel for the plaintiff may cite one case decided by this Court that did not arise under the revenue laws of the United States, and that is the case of Cox *v.* The Collector (12 Wal., 204). The facts of the case are these:

The State authorities of Alabama, pursuant to local law levied a tax at "the rate of $1 per ton of the registered tonnage thereof," on all steamboats plying in the waters of the State. It is said in the statement of the case that "Cox, *under compulsion* and protest, paid the tax demanded;" and the Court says: "Demand of the taxes having been made by the collector, the plaintiffs protested the same were illegal, but they immediately paid the same *to prevent the collector from seizing the steamboats and selling the same in case they refused to pay the amount.*"

It is true the Court uses this languge:

"When the party voluntarily pays the tax he is without remedy in such an action; but if the tax is illegal, or was erroneously assessed, and he paid it by compulsion of law, *or under protest*, or with notice that he intends to institute a suit to test the validity of the tax he may recover it back in an action."

But the facts of the case show: 1. A void tax. 2. *Compulsory* payment; therefore right of recovery. This is precisely the common rule law which is declared by the English and American courts.

Besides the question we are discussing here, was not even mentioned by counsel in that case, nor by the Court, except as introductory to the opinion. The sole and only question was the constitutionality of the tax.

Therefore we suggest that these words, "or under protest," were not used because of any fact or argument in the case, but that they were said incidentally, and in passing to the consideration of the real point involved.

The learned justice who delivered the opinion had been in the habit of writing most of the opinions of the Court in cases arising under the custom and internal revenue laws; and as applied to that class of cases, it was correct to say, "or under protest," and these words were probably intended to apply to that class.

We hardly think this incidental passing remark of the Court is sufficient to overrule its judgment in Elliott *v.* Swartwont, and overturn the numerous unbroken line of decisions both in this country and England on this subject. So radical a change in the law is not to be looked for in a mere passing allusion.

2. At common law, and this is the law which must determine the rights of the parties in this case, a protest against an illegal exaction, however formal and specific, did not *of itself* give the plaintiff a right to recover back the money, unless in addition there was legal compulsion such as duress of person or goods.

Oats vs. Hudson, 5. Eng. L. and E., 469 and note.

Silliman vs. Wing 7 Hill., 159.

Fleetwood vs. the City of New York, 2. Sandf., 479.

Allentown vs. Seager, 20. Pa. St., 421.

Mays vs. Cincinnati, 1. Ohio St., 268.

Smith vs. the Inhabitants se 27. Me., 145.

Preston vs. Boston 4. Met., 181.

Preston vs. Boston, 12. Pick., 13.

Walker vs. St. Louis, 15. Mo., 381.

Jenks vs. Lima, 17. Ind., 326.

Dillon on Municipal Corp., Sec. 751.

26. Mich., 119.

8. Kansas, 431.

Substantially the same rule is held in Maryland, Alabama, Virginia, Illinois and Wisconsin.

The ground for recovery here is the *protest*, not distress or threatened distress of goods; therefore it seems to us that the plaintiff is unfortunate in its citation of federal decisions, even if they did apply to this class of cases. Those decisions must be fatal to its right of recovery, because the protest is too indefinite and uncertain, as shown by Mr. Munger's brief.

In Swanstown *v.* Morton, (1 Curtis, 296) the judge says in speaking of the act of 1845: "The protest must declare what is objected to, and what are the grounds upon which the objection rests. I shall not permit any ground not distinctly and specially set forth in the protest to be relied on at the trial." The same rule held in Kreasler *v.* Morton (Id., 417).

Again the judge says, (2 Curtis, 235): "I understand the act of 1845, which refers to protest, had two objects in view, one to apprise the collector of the objections entertained by the importer, before it shall be too late to remove them, if capable of being removed; the other to hold the importer to *these objections* which he then contemplated, and on which he really acted, and prevent him, or others in his behalf from seeking out defects in the proceedings after the business shall have closed by payment of the money into the treasury." Also to the same effect is Id., 239, 2 Blatch. 390, 495, 507, 512, 514, 517.

In Nichols *v.* United States et al. (7 Wal. 126), the court says: "The written protest signed by the party, with the *definite grounds of objection were conditions precedent* to the right to sue, and if omitted, all right of action is gone. These conditions were necessary for the protection of the Government, as they informed the officers charged with the collection of the revenue from imports, of the merchants' reasons for claiming exemption, and enabled the Treasury Department to judge of their soundness, and to decide on the risk of taking the duties in the face of the objections. * * * The al-

lowing a suit at all was an act of beneficence on the part of the Government."

In this case the protest is to the *whole* payment, when it is admitted that about one-half of the lands were taxable, and the tax valid.

Aside from these decisions, a protest, if of any importance, should indicate with reasonable certainty the *void tax*, as well as the reasons *why* it is void, and the protestor must take the chances of accuracy in this particular. The collector has a right to demand this. He should be informed of something *specific* so that he and his principal may have something to act upon, that is, to pay back the money or contest the question. The protest against the *whole tax* was no protest at all. True, the plaintiff may not have known the law at the time, but *ignorantia juris non excusat.* Ignorance of facts is not pretended.

If this kind of a protest will do, no prudent tax-payer will hereafter pay his taxes without filing one with the collector, for something may turn up in the course of a few years that will enable him to recover them back. It will cost nothing to file the protest, and it may catch something.

3. For every beneficial purpose the plaintiff was as much the owner of these lands when the taxes complained of were assessed and paid, as it was after payment of all costs and the issuance of all patents. It and nobody else claimed to own them. It derived great pecuniary benefit from them by reason of such claim of ownership; by sale and hypothetication of them, and therefore every equitable consideration was in favor of the payment of the taxes.

The authorities say that this action is equitable in its nature, and that this is the basis of the right of recovery.

In Bond *v.* Hoyt, (13 Pet. 269, 270) the court says, (citing Lord Mansfield in the case of Bize *v.* Dickason, 1 Term Rep. 285) "The rule has always been if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again." It would seem that

the plaintiff is precisely in this situation, assuming that half of the lands were not technically taxable, and that judgment should go for the defendants for this, if for no other reason.

These taxes were expended long ago for the purposes designated by law, and the financial affairs of the counties have been adjusted upon the basis of such payment being absolute. It would cause great confusion and hardship for the Court to order the assessment and collection of taxes to meet the demands of these suits.

We submit that the plaintiff is not entitled to recover:

1. Because it did not pay the tax under compulsion.

2. Because the alleged protest wholly failed to indicate the part of tax claimed to be illegal, and the grounds of the alleged illegality. And,

3. Because the claim for recovery is not based upon any equitable considerations.

Mr. Munger has so thoroughly presented the essential points of the case, that I deem further remark unnecessary.

CLINTON BRIGGS,
Of counsel in similar cases.